

2012

## The Article II Safeguards of Federal Jurisdiction

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### Repository Citation

Grove, Tara Leigh, "The Article II Safeguards of Federal Jurisdiction" (2012). *Faculty Publications*. 1265.  
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# THE ARTICLE II SAFEGUARDS OF FEDERAL JURISDICTION

*Tara Leigh Grove\**

*Jurisdiction stripping has long been treated as a battle between Congress and the federal judiciary. Scholars have thus overlooked the important (and surprising) role that the executive branch has played in these jurisdictional struggles. This Article seeks to fill that void. Drawing on two strands of social science research, the Article argues that the executive branch has a strong incentive to use its constitutional authority over the enactment and enforcement of federal law to oppose jurisdiction-stripping measures. Notably, this structural argument has considerable historical support. The executive branch has repeatedly opposed jurisdiction-stripping proposals in Congress. That has been true even when the President was otherwise deeply critical of the federal courts' constitutional jurisprudence (such as during the Franklin Roosevelt and Reagan Administrations). Furthermore, even when jurisdiction-stripping measures do become law, the executive branch controls the enforcement of that law. The Department of Justice has repeatedly used this enforcement authority to urge the courts to interpret jurisdictional restrictions narrowly in order to preserve jurisdiction over constitutional claims. This executive branch practice has important implications for the current Justice Department as it litigates cases brought by current and former detainees in the war on terror. One provision of the Military Commissions Act of 2006 appears to preclude any court from examining a detainee's challenge to his "conditions of confinement" during his detention. The executive branch could substantially limit the impact of this law by conceding (as it has in prior administrations) that the federal courts retain jurisdiction over constitutional claims.*

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\* Assistant Professor, William and Mary Law School. Many thanks, for comments and suggestions, to Jack Beermann, Neal Devins, Richard Fallon, David Fontana, Barry Friedman, Ron Krotoszynski, David Landau, Gary Lawson, Tom Lee, Daryl Levinson, John Manning, Dan Meltzer, Henry Monaghan, Trevor Morrison, Jim Pfander, Marty Redish, Lori Ringhand, Mark Seidenfeld, David Shapiro, and Amanda Tyler. This paper was selected for presentation at the Junior Faculty Federal Courts Workshop, University of Illinois College of Law (October 2010). I am grateful for the suggestions made at that workshop and at the workshops at Notre Dame Law School (October 2011), Fordham University School of Law (October 2011), Kansas University School of Law (September 2011), Northwestern University School of Law (February 2011), and at the Southeast Regional Junior Faculty Working Papers Conference, University of Florida (December 2010).

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## INTRODUCTION

Scholars have long debated the scope of Congress’s power to curb federal jurisdiction. The recurring concern over this issue stems from an apparent tension in Article III: Although that provision vests the federal courts with the “judicial Power” to decide issues of federal law,<sup>1</sup> it also gives Congress broad power to regulate federal jurisdiction.<sup>2</sup> Commentators worry that, when federal courts issue controversial opinions (or seek to protect unpopular groups), Congress will respond by taking away their power to decide cases altogether.

Although scholars have expressed concern about a variety of efforts to limit federal jurisdiction, two issues have repeatedly dominated the debate: Congress’s authority to make broad “exceptions” to the Supreme Court’s appellate jurisdiction and to strip all federal jurisdiction over con-

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1. U.S. Const. art. III, § 1.

2. See *id.* § 2 (providing Supreme Court’s appellate jurisdiction is subject to “such Exceptions, and . . . such Regulations as the Congress shall make”); *infra* notes 17–18 and accompanying text (describing congressional discretion in establishing and regulating lower courts).

stitutional claims.<sup>3</sup> There seems to be a consensus that such laws would be at odds with “the structure and spirit of the [Constitution].”<sup>4</sup> But many scholars nevertheless conclude that Congress could enact such statutes, if it so chose.<sup>5</sup> In short, a prevailing view is that the Constitution has left the federal judiciary largely at the mercy of Congress.

This Article argues that scholars have overlooked an important (and surprising) advocate for the federal judiciary in these jurisdictional struggles: the executive branch. The Constitution gives the President considerable authority to block constitutionally questionable legislation. The President can veto problematic legislation or use the threat of a veto to urge Congress to pursue other alternatives. Moreover, under Article II’s Take Care Clause, the President is in charge of enforcing federal law in the federal courts—a task that he has largely delegated to the Department of Justice (DOJ).<sup>6</sup> The executive branch can use this enforcement authority to ensure that laws are applied in a manner that accords with constitutional values.

Drawing on recent social science scholarship, this Article contends that the executive branch has a strong incentive to use this constitutional authority to oppose efforts to curb federal jurisdiction. First, social scientists have argued that the President often expresses his constitutional philosophy through litigation in the federal courts. Accordingly, the President has some incentive to ensure that the federal courts retain jurisdiction over constitutional claims. These presidential incentives are reinforced by the institutional incentives of the DOJ. Relying on theories of path dependence and institutional entrenchment, this Article argues that the DOJ has a substantial interest in defending the authority of the federal judiciary, because it can thereby maintain its own enforcement power. The DOJ has a particularly overriding interest in protecting the

3. See, e.g., Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 *Colum. L. Rev.* 1002, 1005 (2007) (urging Congress must give Supreme Court “the final judicial word” on federal law); Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 *Va. L. Rev.* 1043, 1086 (2010) (arguing “a statute withdrawing both Supreme Court and lower federal court jurisdiction” over constitutional claims “would violate the Constitution”); James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 *Nw. U. L. Rev.* 191, 213 (2007) [hereinafter Pfander, *Federal Supremacy*] (asserting lower courts must be subject to Supreme Court “oversight and control”); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 *Harv. L. Rev.* 17, 66 (1981) (contending Congress must provide federal court review of constitutional claims).

4. Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 *Vill. L. Rev.* 1030, 1039 (1982).

5. See Peter J. Smith, *Textualism and Jurisdiction*, 108 *Colum. L. Rev.* 1883, 1892–94 (2008) (noting “the traditional view” of Article III is that Congress has plenary power over federal jurisdiction); *infra* notes 14–22 and accompanying text (explaining “plenary power” theory).

6. See U.S. Const. art. II, § 3 (specifying President “shall take Care that the Laws be faithfully executed”).

appellate jurisdiction of the Supreme Court, because the Solicitor General is in charge of all federal litigation at that level. By defending the authority of the Supreme Court, the DOJ can maximize its power and influence over the development of federal law.

In sum, this Article contends that the executive branch has strong institutional incentives to oppose the very kind of legislation that scholars find most problematic: restrictions on the Supreme Court's appellate jurisdiction and the federal courts' authority to adjudicate constitutional claims. The executive branch should be inclined to use its constitutional authority to shield the judiciary from such challenges to the federal judicial power.

This structural argument has considerable historical support. The executive branch has sought to protect federal jurisdiction in two major ways. First, the executive branch has repeatedly opposed bills targeted at the Supreme Court's appellate review power or at federal jurisdiction over constitutional claims.<sup>7</sup> Notably, that has been true even when the President strongly disagreed with the federal courts' constitutional jurisprudence. For example, during the New Deal era, the Roosevelt Justice Department opposed efforts to eliminate the Supreme Court's appellate jurisdiction over constitutional claims.<sup>8</sup> Likewise, the Reagan Justice Department spoke out against proposals to strip federal jurisdiction over cases involving school prayer and abortion.<sup>9</sup> Other DOJ officials have similarly urged Congress to refrain from enacting jurisdiction-stripping proposals, at times expressly invoking the threat of a presidential veto.

Although most jurisdiction-stripping bills have been defeated in the legislative process, some proposals to curb federal jurisdiction have, in recent decades, captured sufficient political support to gain the assent of both Congress and the President. But the executive branch has an additional constitutional tool to limit the impact of such laws: The DOJ controls the enforcement of most federal laws and can urge the federal judiciary to interpret those laws narrowly in order to preserve federal jurisdiction. That is the approach that recent Justice Departments have taken. Both the Clinton and the second Bush Administrations urged the courts to construe broadly worded jurisdiction-stripping statutes, like the Antiterrorism and Effective Death Penalty Act, so as to preserve jurisdiction over federal constitutional claims.<sup>10</sup>

The federal courts, of course, could disregard these arguments and independently determine their jurisdiction. But, to the extent that the

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7. See *infra* Part II (describing executive branch efforts to preserve jurisdiction through legislative process).

8. See *infra* Part II.A (describing Roosevelt Administration's opposition to efforts to strip Supreme Court's appellate jurisdiction).

9. See *infra* Part II.D (describing Reagan Justice Department's opposition to jurisdiction-stripping proposals).

10. See *infra* Part III.B.2 (describing Clinton and Bush Administration approaches to federal jurisdiction).

courts are already inclined to interpret jurisdiction-stripping laws narrowly, the DOJ's arguments provide substantial reassurance that such constructions will have the support of a coequal branch of the federal government. And, in practice, the federal judiciary has proven quite receptive to the executive branch's efforts to preserve the scope of federal jurisdiction.

It is important, however, not to overstate the extent of these Article II safeguards. First, the argument is limited to efforts to restrict federal jurisdiction, where the executive branch has an institutional interest in preserving judicial authority. This Article does *not* claim that the executive will oppose all court-curbing efforts. Furthermore, the executive branch has not sought to block every jurisdiction-stripping measure; some have been enacted into law with the President's assent. Finally, the DOJ has not always advocated a narrow construction of jurisdiction-stripping laws (although it has done so increasingly in recent years). But, notwithstanding these exceptions, the executive branch has repeatedly used its constitutional authority to protect the federal judicial power.

This argument has important implications for scholarship in federal courts and constitutional law. First, this analysis provides a missing ingredient in the debate over Congress's power to restrict federal jurisdiction by emphasizing the substantial role that the executive branch has played in these jurisdictional struggles. Moreover, this analysis offers an important correction to a theory that has gained traction in recent years: that partisan politics has eclipsed the checks and balances created by the Constitution, so that we now live in a world dominated by the "separation of parties, not powers."<sup>11</sup> As this historical survey demonstrates, the executive branch has repeatedly opposed jurisdiction-stripping proposals in Congress—even when those proposals were championed by members of the President's own party. Accordingly, in this crucial context, the judiciary has been protected by the separation of powers, not parties.

Finally, the analysis here has significant implications for the current Justice Department as it litigates cases brought by current and former detainees in the war on terror. The Military Commissions Act of 2006 (in a provision that the Supreme Court has not yet construed) appears to preclude any alleged "enemy combatant" from challenging, even on constitutional grounds, his "conditions of confinement" during his detention.<sup>12</sup> The DOJ could substantially limit the impact of this legislation by

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11. Daryl J. Levinson & Richard H. Pildes, Separation of Parties, Not Powers, 119 Harv. L. Rev. 2311, 2385 (2006) ("The enduring institutional form of democratic political competition has turned out to be not branches but political parties."); see also *infra* Part IV.C.1 (describing how findings presented in this Article offer qualification to this theory).

12. See 28 U.S.C. § 2241(e)(2) (2006) (prescribing "no court, justice, or judge shall have jurisdiction . . . [over any] action against the United States or its agents relating to any aspect of the detention . . . or conditions of confinement" of an alleged enemy combatant); *Boumediene v. Bush*, 128 S. Ct. 2229, 2274 (2008) (declining to "discuss the reach of the writ [of habeas corpus] with respect to claims of unlawful conditions of treatment or confinement").

conceding, as it has in prior administrations, that the federal courts retain jurisdiction over federal constitutional claims.

The argument for these Article II safeguards proceeds as follows. Part I discusses prior scholarship on Congress's power to curb federal jurisdiction. It asserts that the executive branch offers an important (and previously overlooked) structural protection for the federal judiciary. Parts II and III provide historical support for this claim, recounting how the executive branch has used its role both in the legislative process and in litigation to protect the scope of federal jurisdiction. Finally, Part IV discusses the scope and limitations of these Article II safeguards. The Article observes in part that the Justice Department may have an even stronger incentive than the President to defend the judiciary and may take advantage of "agency slack" to protect the scope of federal jurisdiction. The Article further asserts that, even in the context of the war on terror, the executive branch could use its constitutional authority to protect the Article III judicial power.

## I. THE THEORY

Scholars have long puzzled over the scope of Congress's authority to regulate federal jurisdiction. But two issues have dominated the debate: Congress's authority to restrict the Supreme Court's appellate jurisdiction and to strip all federal jurisdiction over constitutional claims. The structural safeguards of Article II may work particularly well to protect federal jurisdiction in these two contexts.<sup>13</sup>

### A. *The Search for Limits on Congress's Power*

Many commentators argue that Congress has plenary power over federal jurisdiction.<sup>14</sup> These scholars note that, under Article III, the

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13. The term "jurisdiction stripping" is used throughout this Article to refer to efforts to restrict federal jurisdiction over a class of cases (such as cases involving school prayer). Such jurisdictional restrictions are likewise the focus of other scholarly literature on this subject. Accordingly, the definition does not include other types of statutory limitations on federal jurisdiction, such as amount-in-controversy requirements.

14. See Charles L. Black, Jr., *Decision According to Law* 18 (1981) ("My own position is . . . that Congress does have very significant power over the courts' jurisdiction."); Raoul Berger, *Insulation of Judicial Usurpation: A Comment on Lawrence Sager's "Court-Stripping" Polemic*, 44 *Ohio St. L.J.* 611, 614 (1983) ("Congressional control of the courts' jurisdiction under article III has the sanction of the First Congress, draftsmen of the Judiciary Act of 1789, and of an unbroken string of decisions stretching from the beginning of the Republic."); John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 *U. Chi. L. Rev.* 203, 204 (1997) (defending "the traditional view that Congress's authority is substantial"); Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 *U. Pa. L. Rev.* 1633, 1637 (1990) [hereinafter Redish, *Common Sense*] (arguing "the inescapable implication of the text is that Congress possesses broad power to curb the jurisdiction of both the lower courts and the Supreme Court"); Herbert Wechsler, *The Courts and the Constitution*, 65 *Colum. L. Rev.* 1001, 1005 (1965) (finding "no basis" for view that Congress lacks such plenary power).

Supreme Court's appellate jurisdiction is subject to "*such Exceptions, and . . . such Regulations as the Congress shall make*"<sup>15</sup> and conclude that this Exceptions Clause gives Congress broad power to remove cases from the Court's appellate oversight.<sup>16</sup> There is even greater consensus on Congress's authority over the inferior federal courts. Under Article III, the creation of those courts is left to the discretion of Congress.<sup>17</sup> Most commentators conclude that Congress may also determine to what extent such courts are needed to enforce federal law.<sup>18</sup> In sum, these scholars reach what Martin Redish has described as the "inescapable" conclusion—that Congress's authority over federal jurisdiction is unconstrained by Article III.<sup>19</sup>

But even those who subscribe to this "plenary power" theory argue that Congress should generally refrain from exercising its authority.<sup>20</sup> They express particular concern about proposals to restrict the Supreme Court's appellate review power or the federal courts' authority to hear

15. U.S. Const. art. III, § 2 (emphasis added).

16. See Bator, *supra* note 4, at 1038 (urging Exceptions Clause "plainly seems to indicate that if Congress wishes to exclude a certain category of federal constitutional (or other) litigation from the [Supreme Court's] appellate jurisdiction, it has the authority to do so"); Berger, *supra* note 14, at 622 (arguing "[t]he burden is on [those who would challenge Congress's authority] to demonstrate that the plenary, unequivocal terms of the exceptions clause mean less than they say"); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 *Stan. L. Rev.* 895, 901 (1984) (urging "[o]n its face, the exceptions clause of article III, section 2, seems to grant a quite unconfined power to Congress to withhold from the [Supreme] Court a large number of classes of cases potentially within its appellate jurisdiction"); Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 *Vill. L. Rev.* 900, 901–02 (1982) ("A common sense interpretation of the constitutional language [in the Exceptions Clause] would seem to lead to the conclusion that Congress possesses fairly broad authority to curb Supreme Court appellate jurisdiction.").

17. See U.S. Const. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); Sager, *supra* note 3, at 48 ("[T]he Constitution neither created nor forbade the creation of lower federal courts; their existence was left to the discretion of Congress.").

18. See, e.g., Bator, *supra* note 4, at 1030–31 (arguing Constitution "leaves it to Congress to decide, having created lower federal courts, what their jurisdiction should be").

19. Redish, *Common Sense*, *supra* note 14, at 1637. These "plenary power" scholars do generally assume that Congress's authority is constrained by constitutional sources other than Article III, and that the federal courts can enforce such "external" constraints—although they often dispute the scope of those limits. See Gunther, *supra* note 16, at 916–22 (discussing some of the debates); Amanda L. Tyler, *Suspension as an Emergency Power*, 118 *Yale L.J.* 600, 607–08 (2009) (noting Suspension Clause, "[b]y its terms, . . . constitutes . . . a limitation upon . . . congressional power" over habeas jurisdiction, but also observing that scholars have debated scope of that limit).

20. See, e.g., Martin H. Redish, *Same-Sex Marriage, the Constitution, and Congressional Power to Control Federal Jurisdiction: Be Careful What You Wish For*, 9 *Lewis & Clark L. Rev.* 363, 369 (2005) (arguing "as a matter of policy," Congress should have "very strong presumption against" jurisdiction stripping).



constitutional claims. For example, Paul Bator argued that “[a] statute depriving the Supreme Court of appellate jurisdiction over . . . constitutional litigation *would* . . . violate the spirit of the Constitution, even if it would not violate its letter.”<sup>21</sup> Likewise, Gerald Gunther urged that, although Congress has the “sheer legal authority” to eliminate federal jurisdiction over constitutional claims, any such law would be “unwise” and contrary to “the ‘spirit’ of the Constitution.”<sup>22</sup>

Other scholars, however, have proposed broader—and judicially enforceable—limits on Congress’s power over federal jurisdiction. Much of this work (albeit not all<sup>23</sup>) also emphasizes the importance of the Supreme Court’s appellate jurisdiction and federal jurisdiction over constitutional claims.

A growing number of commentators have argued that the Supreme Court has an “essential role” in the constitutional scheme and that Congress must provide the Court with sufficient appellate jurisdiction to perform that role. The foundation for this argument was laid in a famous essay by Henry Hart. Professor Hart asserted that “the exceptions [to the Court’s appellate jurisdiction] must not be such as will destroy the essential role of the Supreme Court in the constitutional plan.”<sup>24</sup> Leonard Ratner and Evan Caminker later expanded upon this theory. Professor Ratner argued that the Supreme Court’s “essential appellate functions” are to preserve the uniformity and supremacy of federal law,<sup>25</sup> while Dean Caminker asserts that the Supreme Court must have sufficient ap-

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21. Bator, *supra* note 4, at 1039.

22. Gunther, *supra* note 16, at 921. Professor Redish has suggested that a statute preventing federal courts from adjudicating constitutional claims against federal officials might violate the Due Process Clause—unless state courts were permitted to adjudicate those claims. Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 *Nw. U. L. Rev.* 143, 158–59 (1982).

23. There are, of course, important theories that do not focus on either the Supreme Court or constitutional claims. See Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 *B.U. L. Rev.* 205, 229–30 (1985) (urging Congress must give either Supreme Court or inferior federal courts jurisdiction over cases arising under federal law as well as admiralty and ambassador suits); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 *U. Pa. L. Rev.* 741, 749–50 (1984) (arguing Congress must “allocate to the federal judiciary as a whole . . . every type of case or controversy” listed in Article III).

24. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 *Harv. L. Rev.* 1362, 1365 (1953).

25. Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 *U. Pa. L. Rev.* 157, 161 (1960); see also Leonard G. Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 *Vill. L. Rev.* 929, 935 (1982) (reading Supremacy Clause as defining Court’s “essential functions” to be enforcing uniformity and supremacy).

pellate jurisdiction to “provid[e] general leadership in defining federal law” for the judiciary.<sup>26</sup>

Some scholars have recently claimed that, in order to maintain its “supreme” role, the Supreme Court must have the power to review every lower court case involving federal law. James Pfander asserts that the Court must be able to review all lower federal and state court decisions either on direct appeal or by issuing “supervisory writs,” such as writs of habeas corpus or mandamus, in individual cases.<sup>27</sup> Other commentators, including Steven Calabresi and Gary Lawson, have argued that the Supreme Court must have the authority to review every federal question, either as an original matter or on appeal from a lower court.<sup>28</sup> These scholars claim that the Exceptions Clause does not permit Congress to “strip” the Supreme Court’s jurisdiction at all, but only to move cases between the Court’s original and appellate jurisdiction (a position that, they acknowledge, is at odds with the holding of *Marbury v. Madison* that Congress may not enlarge the size of the Court’s original jurisdiction).<sup>29</sup>

Furthermore, although scholars seem to agree that Congress has more power over inferior federal court jurisdiction, they have often sought to ensure that the federal courts as a whole can hear federal constitutional claims. For example, Professor Hart argued that, even if Congress has the power to eliminate federal jurisdiction over constitutional issues, the judiciary should resist such efforts through statutory in-

26. Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 *Stan. L. Rev.* 817, 873 (1994).

27. James E. Pfander, *One Supreme Court: Supremacy, Inferiority, and the Judicial Power of the United States* 25, 34–38 (2009); see James E. Pfander, *Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals*, 78 *Tex. L. Rev.* 1433, 1500 (2000) (arguing it would raise “serious constitutional questions” if Congress eliminated both Court’s appellate jurisdiction and its authority to supervise lower federal courts by issuing discretionary writs); see also Pfander, *Federal Supremacy*, *supra* note 3, at 236 (making similar claim with respect to state courts).

28. See Calabresi & Lawson, *supra* note 3, at 1023, 1038 (“Read holistically, the constitutional text . . . says that there must be one Supreme Court which will have the last word on all questions of federal law.”); Laurence Claus, *The One Court that Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 *Geo. L.J.* 59, 64 (2007) (“Congress can never use the Exceptions power to remove from the Supreme Court the ability to have ultimate judgment of Article III matters.”).

29. 5 U.S. (1 Cranch) 137, 174–80 (1803); see Calabresi & Lawson, *supra* note 3, at 1036–43 (contending “[t]he Exceptions Clause contemplates that Congress might move cases back and forth between the Court’s original and appellate jurisdiction” and acknowledging contention’s “inconsisten[cy] with the bedrock holding of *Marbury v. Madison*”); Claus, *supra* note 28, at 77–80, 107 (arguing “Congress has power to remove matters from the appellate-jurisdiction pasture, but that action does not let those matters escape the field, it just shifts them to the original-jurisdiction pasture” and that *Marbury* “risked the Court’s role as ultimate expositor of federal law under Article III”); Alex Glashauser, *A Return to Form for the Exceptions Clause*, 51 *B.C. L. Rev.* 1383, 1390, 1397–99, 1406–07, 1449 (2010) (arguing “the Exceptions Clause simply serves as a reminder that Congress may . . . rearrange jurisdictional form” and recognizing “cases such as *Marbury* . . . more or less explicitly embraced the conception of jurisdiction-stripping power”).

terpretation.<sup>30</sup> Professor Hart asserted: “If Congress wants to frustrate the judicial check, our constitutional tradition requires that it be made to say so unmistakably . . . .”<sup>31</sup>

Other scholars contend that a statute eliminating federal jurisdiction over constitutional claims would violate Article III. Richard Fallon suggests that such a restriction would be invalid if Congress’s purpose were to invite state court defiance of Supreme Court precedent.<sup>32</sup> And Lawrence Sager asserts that constitutional claims must be heard by judges with life tenure and salary protections.<sup>33</sup> Thus, Congress may take jurisdiction over such claims from either the Supreme Court or the lower federal courts, but not both.

Some commentators have also recently emphasized the importance of federal jurisdiction over constitutional claims in the context of the war on terror. They focus on a provision of the Military Commissions Act of 2006 (MCA), which purports to prevent any federal court from reviewing an action “against the United States or its agents relating to any aspect of the . . . conditions of confinement” of a designated “enemy combatant.”<sup>34</sup> (Notably, state courts likely have no power to review federal military detention;<sup>35</sup> accordingly, this provision seems to cut off all judicial review of detainee claims.)

Scholars assert that the MCA is unconstitutional to the extent that it precludes federal jurisdiction over constitutional claims.<sup>36</sup> For example, Richard Fallon and Daniel Meltzer contend that the MCA’s “total preclusion of review” violates a fundamental “postulate of the constitutional structure”: that “some court must always be open to hear an individual’s claim to . . . judicial redress of a constitutional violation.”<sup>37</sup> Janet Alexander has asserted that “the complete denial of judicial review of constitutional claims is beyond Congress’s power under the

30. Hart, *supra* note 24, at 1398–99.

31. *Id.* at 1399.

32. See Fallon, *supra* note 3, at 1083 (“Legislation barring both Supreme Court and lower federal court jurisdiction over challenges to [state] legislation . . . should . . . be held invalid based on its constitutionally forbidden purpose of encouraging defiance of applicable Supreme Court precedent.”).

33. See Sager, *supra* note 3, at 65–66 (arguing “[c]laims of constitutional right present the most compelling cases for the imposition of the article III requirements”).

34. 28 U.S.C. § 2241(e)(2) (2006).

35. See *Tarble’s Case*, 80 U.S. (13 Wall.) 397, 411–12 (1871) (preventing state courts from issuing writs of habeas corpus to citizens held by federal officers).

36. See, e.g., Tyler, *supra* note 19, at 684 n.401 (describing conditions-of-confinement provision as “deeply problematic . . . because of the principle . . . that some court must stand open to vindicate constitutional rights for which tradition assigns a judicial remedy”).

37. Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 *Harv. L. Rev.* 2029, 2063 (2007).

Exceptions . . . Clause” of Article III, because it deprives the Supreme Court of its “‘essential role.’”<sup>38</sup>

The above scholarship reflects two basic normative premises: Congress must provide the Supreme Court with sufficient jurisdiction to perform its “supreme” role in the judiciary, and there must be judicial review of constitutional claims. Furthermore, although these scholars offer sharply different theories, they do appear to agree on one thing: The only way to limit Congress’s power is through judicial enforcement—either via statutory construction or judicial review.<sup>39</sup> Absent such enforcement, the federal judiciary is essentially at the mercy of Congress.

My scholarship seeks to challenge that assumption. It asserts that the primary constitutional protection for the federal judiciary lies not in judicial enforcement, but instead in the structural and political constraints built into our constitutional system. My prior work focused on the Article I lawmaking process, which gives competing political factions—even political minorities—considerable power to “veto” legislation.<sup>40</sup> Drawing on social science scholarship, I argued that political factions have a substantial incentive to use their structural veto in the House or in the Senate to block jurisdiction-stripping legislation favored by their opponents.<sup>41</sup>

This Article contends that there is another important (and surprising) structural protection for the federal judiciary: the executive branch. The executive has a strong incentive to use its independent role in the enactment and enforcement of federal law to preserve the scope of federal jurisdiction. Furthermore, this incentive seems to be particularly strong in the very areas that most concern scholars: the Supreme Court’s appellate review power and federal jurisdiction over constitutional claims.

### B. *The Article II Safeguards of Federal Jurisdiction*

The Constitution gives the President an important role in both the enactment and the enforcement of federal legislation. Article II provides for an executive role in proposing legislation, stating that the President “shall from time to time . . . recommend to [Congress] such Measures as he shall judge necessary and expedient.”<sup>42</sup> Furthermore, the President has the constitutional authority to veto or threaten to veto any piece of

38. Janet Cooper Alexander, *Jurisdiction-Stripping in a Time of Terror*, 95 *Calif. L. Rev.* 1193, 1208, 1239 (2007) (quoting Hart, *supra* note 24, at 1365). Professor Alexander also contends that this provision violates the Suspension and Due Process Clauses. *Id.* at 1238–39.

39. See *supra* notes 20–33 and accompanying text (noting scholars sharing view that judicial enforcement is only way to limit Congress’s power).

40. Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 *Harv. L. Rev.* 869 (2011).

41. *Id.* at 890–91, 895–96, 901, 915.

42. U.S. Const. art. II, § 3 (“[The President] shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient . . .”).

legislation.<sup>43</sup> As social scientists have observed, even the threat of a veto can be a powerful tool, one that frequently leads Congress to modify or even forego proposals before they reach the President's desk.<sup>44</sup> The President can use this constitutional authority to block unconstitutional (or at least constitutionally questionable) legislation and to steer Congress toward proposals that he views as more constitutionally legitimate.<sup>45</sup>

Moreover, once a bill is enacted into law, the President is in charge of the enforcement and execution of that law. Article II requires the President to "take Care that the Laws be faithfully executed."<sup>46</sup> The executive branch can use this enforcement authority to lessen the impact of legislation that seems to impinge on constitutional values. Although scholars dispute whether the President can simply decline to enforce statutes that he considers invalid,<sup>47</sup> most commentators seem to agree that

43. See *id.* art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States . . ."); Rebecca E. Deen & Laura W. Arnold, *Veto Threats as a Policy Tool: When to Threaten?*, 32 *Presidential Stud. Q.* 30, 30 (2002) (asserting "[p]residents have many tools in the policy-making process," and that "[o]ne of the most powerful of these is vetoing legislation"); Daniel E. Ingberman & Dennis A. Yao, *Presidential Commitment and the Veto*, 35 *Am. J. Pol. Sci.* 357, 357 (1991) (arguing "[t]he power to veto legislation is an important means through which a president can influence policy").

44. See Charles M. Cameron, *Veto Bargaining: Presidents and the Politics of Negative Power* 3 (2000) (examining "how presidents use vetoes and veto threats to wrest policy concessions from Congress"); Richard S. Conley, *George Bush and the 102d Congress: The Impact of Public and "Private" Veto Threats on Policy Outcomes*, 33 *Presidential Stud. Q.* 730, 731 (2003) (noting "presidents' ability to halt" or change bills not only "through the veto power" but also through "their strategic use of" veto threats); Deen & Arnold, *supra* note 43, at 44 (noting "[t]he veto threat can be an effective tool in the arsenal of [the president's] legislative powers").

45. See *The Federalist* No. 73, at 443 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (asserting veto power "not only serves as a shield to the executive, but . . . furnishes an additional security against the enactment of improper laws"); J. Richard Broughton, *Rethinking the Presidential Veto*, 42 *Harv. J. on Legis.* 91, 127–32 (2005) (noting modern presidents have vetoed bills on constitutional grounds, albeit less often than early presidents).

46. U.S. Const. art. II, § 3.

47. Compare, e.g., Eugene Gressman, *Take Care, Mr. President*, 64 *N.C. L. Rev.* 381, 382 (1986) (arguing once a bill becomes law, "the President has no option under article II but to enforce the measure faithfully"), with David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power*, *Law & Contemp. Probs.*, Winter/Spring 2000, at 61, 64 (asserting President should at times decline to enforce statutes that would be upheld by courts because President can protect constitutional values courts cannot enforce), Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, *Law & Contemp. Probs.*, Winter/Spring 2000, at 7, 12–14 (arguing non-enforcement is appropriate in certain limited circumstances), Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 *Iowa L. Rev.* 1267, 1303 (1996) (arguing President must refuse to enforce statutes he views as unconstitutional), Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 *Geo. L.J.* 217, 221–22 (1994) (arguing President "may

the executive branch can give such laws a narrow construction that better accords with constitutional values.<sup>48</sup> Indeed, Dawn Johnsen has asserted that Presidents *should* “avoid constitutional problems . . . through their interpretation of ambiguous statutes.”<sup>49</sup>

The executive branch has a strong incentive to use this constitutional authority to oppose jurisdiction-stripping legislation. This argument is based on two strands of recent social science research. First, social scientists have asserted that the President often advances his constitutional philosophy through litigation in the federal courts.<sup>50</sup> The judiciary serves as a useful focal point for presidential policies, in part because the executive branch has “close contact” with the federal courts.<sup>51</sup> The President not only plays a central role in selecting federal judges<sup>52</sup> but also

decline to execute acts of Congress on constitutional grounds,” and may even “refuse to execute (or . . . obey) judicial decrees”), and Saikrishna Bangalore Prakash, *The Executive’s Duty to Disregard Unconstitutional Laws*, 96 *Geo. L.J.* 1613, 1616 (2008) (asserting “the Constitution actually *requires* the President to disregard unconstitutional statutes”).

48. See Ronald A. Cass & Peter L. Strauss, *The Presidential Signing Statements Controversy*, 16 *Wm. & Mary Bill Rts. J.* 11, 15–16 (2007) (asserting President’s “obligation to ‘take Care that the Laws be faithfully executed’ . . . gives him authority to advise agencies how they may avoid constitutional issues lurking in” complex statutes (quoting U.S. Const. art. II, § 3)); Johnsen, *supra* note 47, at 9 (“Presidents often avoid constitutional problems, as they should, through their interpretation of ambiguous statutes or through the exercise of enforcement discretion.”); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 *Colum. L. Rev.* 1189, 1226 (2006) (arguing if “[t]he fundamental aim of the avoidance canon . . . is to implement constitutional norms,” then the executive branch should “use the avoidance canon” in interpreting statutes); see also Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 *Mich. L. Rev.* 676, 677, 686 (2005) (arguing, in practice, executive branch has not protected individual rights, although agreeing such constitutional enforcement is normatively attractive). Notably, although Jefferson Powell argues that the executive branch should not use statutory construction to protect its own power, he does not appear to question the propriety of the practice in other contexts. H. Jefferson Powell, *The Executive and the Avoidance Canon*, 81 *Ind. L.J.* 1313, 1316 (2006).

49. Johnsen, *supra* note 47, at 9.

50. See Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* 274 (2007) [hereinafter Whittington, *Foundations*] (arguing Presidents often “[t]urn[] to the judiciary . . . [to] advanc[e] constitutional goals”); Howard Gillman, *Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism*, in *The Supreme Court and American Political Development* 138, 146–55 (Ronald Kahn & Ken I. Kersch eds., 2006) [hereinafter Gillman, *Constitutional Change*] (discussing efforts of Kennedy and Johnson Administrations to appoint judges who would favor civil rights and other progressive causes).

51. See Whittington, *Foundations*, *supra* note 50, at 196.

52. See U.S. Const. art. II, § 2, cl. 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court . . . .”); Sheldon Goldman, *Picking Federal Judges: Lower Court Selection from Roosevelt Through Reagan* 6 (1997) (“[T]he placement of the power of judicial selection with the powers of the president [in Article II] rather than those of Congress suggests that the executive branch is a principal player in the appointment process.”); Mark A. Graber, *James Buchanan as Savior? Judicial Power, Political Fragmentation, and the Failed 1831*

“[t]hrough control over the Justice Department . . . can exercise significant influence over . . . what arguments are presented” to the courts.<sup>53</sup>

The President has a particularly strong incentive to press his policies through the federal judiciary when he faces a hostile (or divided) Congress.<sup>54</sup> For example, President Harry Truman expressly acknowledged his use of litigation to advance constitutional values in the face of legislative opposition. President Truman explained that, after Congress refused to pass a civil rights law, he “did what the President can do, unaided by the Congress.”<sup>55</sup> He sent “the Department of Justice . . . into the Supreme Court” to argue for constitutional rulings that would protect civil rights.<sup>56</sup> Likewise, Presidents Ronald Reagan and George H.W. Bush sought to use the federal judiciary to advance their vision of constitutional federalism when their legislative efforts were stymied in Congress.<sup>57</sup>

The President’s unique position in enforcing federal law gives him an opportunity to advance his constitutional policies through litigation, without substantial interference from the legislature. Political scientist Keith Whittington asserts that this largely explains the President’s support for the judiciary, and particularly for the exercise of judicial review.<sup>58</sup> This Article argues that this unique opportunity also gives the President a strong incentive to ensure that the federal courts retain jurisdiction over constitutional claims.

These presidential incentives are reinforced by the institutional incentives of the Department of Justice. Drawing on theories of path dependence and institutional entrenchment,<sup>59</sup> this Article contends that the

Repeal of Section 25, 88 Or. L. Rev. 95, 103 (2009) (“Presidents . . . typically have more influence than legislators on the staffing of federal courts.”).

53. Whittington, *Foundations*, supra note 50, at 196.

54. See Graber, supra note 52, at 102 (observing judiciary can be “a vital presidential ally against a recalcitrant Congress”).

55. President Harry S. Truman, Address in Harlem, New York, upon Receiving the Franklin Roosevelt Award, 1948 Pub. Papers 923, 924 (Oct. 29, 1948).

56. *Id.*; see also Whittington, *Foundations*, supra note 50, at 99 (observing “Harry Truman’s Justice Department . . . urged the Court to take action on” civil rights issues).

57. See Douglas W. Kmiec, *The Attorney General’s Lawyer: Inside the Meese Justice Department* 136–37 (1992) (observing Reagan Administration used litigation “to redress the federalism imbalance” in existing law); Gillman, *Constitutional Change*, supra note 50, at 159.

58. See Whittington, *Foundations*, supra note 50, at 5 (arguing “[t]hrough much of American history, presidents have found it in their interest to defer to the Court and encourage it to take an active role in defining the Constitution and resolving constitutional controversies”).

59. See Douglass C. North, *Institutions, Institutional Change and Economic Performance* 100 (1990) (“Path dependence means that history matters. We cannot understand today’s choices . . . without tracing the [past] . . . evolution of institutions.”); Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* 35 (2004) (“[S]ocial actors make commitments based on existing institutions and policies. As they do so, the cost of reversing course generally rises dramatically.”). For a definition of “path dependence,” see Margaret Levi, *A Model, a Method, and a Map: Rational Choice in*

DOJ has a strong incentive to defend the scope of federal jurisdiction, because it can thereby maintain its own authority and influence over the development of federal law.

Social scientists have argued that institutions, like the judiciary, may become “entrenched” (or “locked-in”) in part because they serve as sources of power and influence for other groups in society.<sup>60</sup> For example, many special interest groups have found that litigation is a useful way to achieve their policy objectives.<sup>61</sup> Such organizations develop considerable legal expertise (what social scientists refer to as “asset-specific investments” in the judicial system)<sup>62</sup> and, as a result, have an interest in ensuring that legal and policy decisions are made by courts, rather than by other government institutions.<sup>63</sup> In other words, these “litigation machines” have a strong interest in the preservation (or entrenchment) of the judiciary.<sup>64</sup> Any policy that undermines the court system simultaneously takes away their primary source of power and influence.

Comparative and Historical Analysis, *in* *Comparative Politics: Rationality, Culture, and Structure* 19, 28 (Mark Irving Lichbach & Alan S. Zuckerman eds., 1997) (“Path dependence has to mean, if it is to mean anything, that once a country or region has started down a track, the costs of reversal are very high. . . . [T]he entrenchments of certain institutional arrangements obstruct an easy reversal of the initial choice.”).

60. See Pierson, *supra* note 59, at 35, 159 (“[I]nstitutions induce self-reinforcing processes that make reversals increasingly unattractive over time. . . . Institutions and policies may encourage individuals and organizations to invest in specialized skills . . . . These activities increase the attractiveness of existing institutional arrangements [and] . . . push individual behavior onto paths that are hard to reverse.”). Notably, the older an institution is, the more “locked-in” it will be. See *id.* at 147 (asserting incentives created by asset-specific investments are “likely to accumulate with the passage of time”).

61. See Paul Pierson & Shannon O’Neil Trowbridge, *Asset Specificity and Institutional Development* 22 (Aug. 29–Sept. 1, 2002) (unpublished paper prepared for delivery at the 2002 Annual Meeting of the American Political Science Association) (on file with the *Columbia Law Review*) (“[T]he strong role of U.S. courts in shaping public policy encourages (and highly values) the development of legal expertise within lobbying groups.”).

62. See Peter Alexis Gourevitch, *The Governance Problem in International Relations*, *in* *Strategic Choice and International Relations* 137, 144–45 (David A. Lake & Robert Powell eds., 1999) (“Political actors develop investments, ‘specific assets,’ in a particular arrangement—relationships, expectations, privileges, knowledge of procedures, all tied to the institutions at work. . . . [This] helps to explain institutional persistence. [A]ctors . . . have incentives to protect their investment by opposing change.”).

63. See Pierson, *supra* note 59, at 159 (“[A] number of mechanisms . . . appear to make expansions of court power virtually irreversible. The emergence of courts as the site of political and legal dispute resolution generates a rapid expansion of law-centered actors who have a considerable stake in preserving and expanding the use of these procedures . . . .” (footnote omitted)).

64. Pierson & Trowbridge, *supra* note 61, at 22, 26 (“[M]any advocacy groups are little more than fund-raising and litigation machines.”). Notably, social scientists do not contend that change is impossible, just that it is made more difficult by these institutional arrangements. See Pierson, *supra* note 59, at 52 (“Nothing in path-dependent analyses implies that a particular alternative is ‘locked in’ following the move onto a self-reinforcing path.”).



This analysis also applies to the relationship between the DOJ and the federal judiciary, particularly the Supreme Court. The DOJ's primary function is to represent the interests of the United States in federal court.<sup>65</sup> Thus, the Justice Department is, in many respects, the government's "litigation machine."<sup>66</sup> The DOJ's power and influence within the executive branch is therefore greatest when decisions are hammered out in litigation.

The DOJ's "asset-specific investments" in the judiciary give it a strong interest in preserving the federal courts' authority. But that is particularly true at the Supreme Court level. Although the DOJ is responsible for most federal litigation, it does share some of that authority with other agencies at the lower court level.<sup>67</sup> In the Supreme Court, by contrast, the Solicitor General is essentially the exclusive representative of the United States.<sup>68</sup> Thus, as former Solicitor General Drew Days put it, "[o]nce cases reach the Supreme Court, the Solicitor General plays an important role in the development of American law" and can have a substantial "impact

65. See 28 U.S.C. § 516 (2006) ("Except as otherwise authorized by law, the conduct of litigation in which the United States . . . is interested . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General.").

66. The DOJ does, of course, engage in nonlitigation activities, such as the law enforcement tasks of the Federal Bureau of Investigation. See U.S. Dep't of Justice, Agencies, <http://www.justice.gov/agencies/> (on file with the *Columbia Law Review*) (last visited Oct. 18, 2011) (providing overview of current components of DOJ). But the DOJ's central function (and, indeed, the primary reason for its creation) is to litigate cases on behalf of the United States. See Act of June 22, 1870, ch. 150, § 5, 16 Stat. 162, 163 (giving DOJ power and responsibility to "conduct and argue" any "cases in which the United States is interested"); Cong. Globe, 41st Cong., 2d Sess. 3035 (1870) (statement of Rep. Thomas Jenckes) (stating central object of "this bill [creating the DOJ] is to establish a staff of law officers . . . to transact [the] law business of the Government in all parts of the United States").

67. See Neal Devins & David E. Lewis, Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design, 88 B.U. L. Rev. 459, 488 (2008) ("Outside of Supreme Court litigation, which is typically controlled by the Solicitor General, the President cannot use the Justice Department to ensure the legal policymaking of [certain] independent agencies remains consistent with presidential priorities.").

68. See 28 U.S.C. § 518(a) ("[T]he Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court . . ."); Fed. Election Comm'n v. NRA Political Victory Fund, 513 U.S. 88, 93 (1994) ("[I]f a case is one 'in which the United States is interested,' . . . 'it must be conducted and argued in this Court by the Solicitor General or his designee.'" (citation omitted) (quoting 28 U.S.C. § 518(a); *United States v. Providence Journal Co.*, 485 U.S. 693, 700 (1988))). A narrow exception to this rule is the Federal Trade Commission, which has limited independent litigating authority before the Supreme Court. If the Solicitor General refuses the FTC's request to seek Supreme Court review, the FTC may file a petition for certiorari. Elliott Karr, Independent Litigation Authority and Calls for the Views of the Solicitor General, 77 Geo. Wash. L. Rev. 1080, 1085 (2009). But if the Solicitor General seeks certiorari, he is in charge of the case. *Id.* at 1090. Notably, in one of the rare cases in which the FTC independently sought certiorari, the Supreme Court still asked for the Solicitor General's views of the case and agreed with his recommendation that certiorari be denied. *Id.* at 1095–96.

upon the establishment of constitutional and other principles.”<sup>69</sup> For this reason, the DOJ has a strong interest in the “entrenchment” of the Court’s appellate review power.

These executive branch incentives (i.e., the President’s desire for a judicial forum for constitutional claims and the DOJ’s interest in Supreme Court review) provide considerable protection for the federal judiciary. The executive branch has a strong incentive to use its authority over the enactment and enforcement of federal law to safeguard federal jurisdiction.

This structural claim has considerable historical support. The executive branch (as discussed in Part II) has repeatedly opposed jurisdiction-stripping proposals in Congress, even when the President strongly disagreed with the federal courts’ jurisprudence.<sup>70</sup> Thus, both the Roosevelt and the Reagan Justice Departments fought efforts to strip the Supreme Court’s appellate jurisdiction and to eliminate federal jurisdiction over constitutional claims. Moreover (as discussed in Part III), even when jurisdiction-stripping legislation has been enacted into law, the DOJ has repeatedly urged the courts to construe those provisions narrowly in order to preserve federal jurisdiction over constitutional claims.<sup>71</sup> The executive branch has thus turned out to be an important, and effective, advocate for the federal courts.

At the outset, however, it is important to note some qualifications and clarifications about this argument. First (as discussed in Part IV), these Article II safeguards are not absolute. Although the executive branch has consistently opposed jurisdiction-stripping bills that were considered as stand-alone measures, more recent proposals have been part of omnibus legislation (like the Antiterrorism and Effective Death Penalty Act)—the bulk of which the President supported.<sup>72</sup> As social scientists have observed, Presidents rarely veto such omnibus legislation, even when they oppose particular provisions on constitutional or policy grounds.<sup>73</sup> Presidents have thus assented to the jurisdictional restrictions buried in such expansive statutes. Furthermore, the DOJ has not always argued for a narrow construction of jurisdiction-stripping laws.<sup>74</sup> But, no-

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69. Drew S. Days III, *Executive Branch Advocate v. Officer of the Court: The Solicitor General’s Ethical Dilemma*, 22 *Nova L. Rev.* 679, 680 (1998); see Richard L. Pacelle, Jr., *Between Law & Politics: The Solicitor General and the Structuring of Race, Gender, and Reproductive Rights Litigation* 11 (2003) (arguing Solicitor General’s power has increased as role of Supreme Court has grown in importance).

70. See *supra* notes 58–69 and accompanying text (examining executive branch’s long-term institutional reasons to protect scope of federal jurisdiction).

71. See *infra* Part III (discussing DOJ’s history of advocating narrow construction of jurisdiction-stripping laws).

72. See *infra* Part IV.B (discussing limits of Article II safeguards).

73. See *infra* notes 338–339 and accompanying text (discussing Presidents’ likelihood of issuing signing statements rather than vetoing omnibus legislation).

74. See *infra* text accompanying notes 248–259 (discussing DOJ’s approach to jurisdiction-stripping laws).

tably, the Solicitor General has done so consistently in recent years—during the same period that Congress has relied on omnibus legislation.<sup>75</sup> Thus, in the past few decades, even when the executive branch has failed to protect the judiciary in the legislative process, it has done so via litigation.

Second, this Article does not seek to evaluate whether the DOJ *should* have argued for a narrow construction of these jurisdiction-stripping laws.<sup>76</sup> Instead, the goal here is to show that the executive branch's institutional interest in preserving federal jurisdiction has led it to be an important (and previously overlooked) ally for the federal courts.

Finally, this Article does not mean to suggest that the executive branch is exclusively focused on advancing its own power and entirely unconcerned with constitutional values. Indeed, the very fact that the executive branch has repeatedly focused on the Supreme Court and constitutional claims suggests that it may share the intuition of scholars that restricting jurisdiction in those areas would “violate the spirit of the Constitution, even if it would not violate its letter.”<sup>77</sup> Many members of the executive branch may well share that basic constitutional intuition, and that may motivate their conduct to some degree. But the institutional incentives of the President and the DOJ help ensure that they will act upon that intuition and oppose jurisdiction-stripping measures, even when the President has other strong reasons to attack the federal courts.

Notably, this account of federal jurisdiction accords with the design of our constitutional scheme of separated powers. James Madison hoped that the Constitution “could be made politically self-enforcing by aligning the political interests of officials . . . with constitutional rights and rules.”<sup>78</sup> Thus, “the great security . . . consists in giving to those who ad-

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75. See *infra* Part IV.A.3, B (describing Solicitor General's approach to jurisdiction-stripping laws).

76. The DOJ has sometimes adopted a narrow construction of jurisdiction-stripping laws even in the face of statutory language and legislative history strongly indicating that Congress sought to strip all federal jurisdiction. See *infra* Part III. One might question whether the DOJ in those cases was “faithfully” executing the law. But that normative inquiry is not the focus of this Article.

77. Bator, *supra* note 4, at 1039. Furthermore, the President does have some interest in ensuring that the federal courts maintain jurisdiction in other areas. He can use the judiciary to pursue nonconstitutional policies in the face of legislative opposition. See Whittington, Foundations, *supra* note 50, at 197 n.124 (noting “constitutional interpretation is not the only form of policymaking that presidents might pursue through the courts”). But, in part because of our longstanding tradition of judicial supremacy, it is easier for the President to advance his constitutional philosophy in this context. The President can use the administrative state to advance other policies. See Elena Kagan, Presidential Administration, 114 *Harv. L. Rev.* 2245, 2248 (2001) (noting agencies can “showcase and advance presidential policies”).

78. Jack Goldsmith & Daryl Levinson, Law for States: International Law, Constitutional Law, Public Law, 122 *Harv. L. Rev.* 1791, 1832 (2009); Daryl J. Levinson, Parchment and Politics: The Positive Puzzle of Constitutional Commitment, 124 *Harv. L. Rev.* 657, 662 (2011).

minister each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. . . . Ambition must be made to counteract ambition.”<sup>79</sup> In this context, the executive branch’s “ambition”—its interest in preserving its own power and influence over the development of federal law—has led it to “resist” congressional encroachments on the federal judiciary. Thus, the executive branch has used the structural tools of Article II to protect the Article III judicial power.

## II. ARTICLE II SAFEGUARDS IN THE LEGISLATIVE PROCESS

Beginning in the early twentieth century, there were a series of proposals to curtail the Supreme Court’s appellate jurisdiction and federal jurisdiction over constitutional claims.<sup>80</sup> The executive branch repeatedly opposed these proposals—not only when the President favored the fed-

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79. The Federalist No. 51, at 289–90 (James Madison) (Clinton Rossiter ed., 1961).

80. There were also two significant efforts to strip the Supreme Court’s appellate jurisdiction in the nineteenth century. The first challenge occurred in 1831, when the House Judiciary Committee recommended that Congress repeal section 25 of the Judiciary Act of 1789 (the provision authorizing Supreme Court review of state court decisions). See 7 Reg. Deb. app. at lxxvii (1831) (Report upon the Judiciary). During this period, the nation was led by President Andrew Jackson (a well-known critic of the Marshall Court), who might have been expected to favor such a restriction on the Court’s appellate review power. But it does not appear that the executive branch took a position on this measure. See Graber, *supra* note 52, at 126–32, 152 (detailing effort to repeal section 25 and explaining southern Jacksonians supported such challenges to federal judicial power, while northern Jacksonians opposed them and President Jackson generally “remained on the sidelines” of these debates). Nor is it clear that President Jackson would have supported the restriction. As Mark Graber has recounted, although President Jackson criticized the Marshall Court, he also found the Court useful as a means of ensuring state compliance with federal law. Accordingly, in 1833, in response to the nullification crisis with South Carolina, he supported a measure to expand federal jurisdiction. See *id.* at 128–29, 142–43 (“Congress responded to the nullification crisis by passing legislation endorsed by President Jackson that augmented federal courts’ authority. These courts, under the Force Act of 1833, became the first line of defense against local challenges to protective tariffs.”); see also 2 Charles Warren, *The Supreme Court in United States History* 199 n.1 (1922) (describing as “false” the assumption that President Jackson supported repeal of section 25). In any event, the House of Representatives rejected the proposal to repeal section 25 by a sizeable margin (138–51), so the measure never went to the Senate or to the President. See 7 Reg. Deb. 542 (1831) (recording vote rejecting proposed repeal of section 25); Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 Am. L. Rev. 161, 163–64 (1913) (discussing proposal). The second major challenge to the Supreme Court’s appellate jurisdiction occurred in 1868, when the Reconstruction Republicans sought to restrict the Court’s power to review habeas corpus cases from lower federal courts. President Andrew Johnson strongly opposed this measure, and it was enacted only over his veto. See *infra* notes 81, 96, and 334 (discussing these events).

eral courts' jurisprudence,<sup>81</sup> but also when he strongly opposed it.<sup>82</sup> This Part focuses on four cases involving Presidents from different political parties, who had very different views of the federal judiciary.<sup>83</sup> The consistency of the executive branch's approach in these (otherwise distinct) administrations indicates that the executive branch has strong long-term institutional reasons to protect the scope of federal jurisdiction.

### A. *The Roosevelt Justice Department and Jurisdiction Stripping*

Social scientists have argued that President Franklin Roosevelt was a "reconstructive" leader, who sought to reshape the prior constitutional and political order.<sup>84</sup> For many decades, national politics had been dominated by concerns about economic growth and industrial development. Accordingly, many prior Presidents had supported policies that aided large corporations.<sup>85</sup> In the wake of the stock market crash of 1929 and in the midst of the Great Depression, President Roosevelt promised to usher

81. For example, the Kennedy Administration strongly favored reapportionment and filed briefs in support of the Supreme Court's decisions in *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 377 U.S. 533 (1964). See Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* 270 (2009) (noting "the Kennedy administration supported the *Baker* plaintiffs, filing an amicus brief" arguing apportionment violated Fourteenth Amendment). Accordingly, it is perhaps unsurprising that Attorney General Robert Kennedy was "strongly against" congressional efforts to strip federal jurisdiction over reapportionment. Anthony Lewis, *Democrats Weigh Policy on Seating and Districting*, N.Y. Times, Aug. 20, 1964, at 1. An analogous example comes from the nineteenth century. The reconstruction laws were enacted over President Andrew Johnson's veto. See Keith E. Whittington, *Bill Clinton Was No Andrew Johnson: Comparing Two Impeachments*, 2 U. Pa. J. Const. L. 422, 437 (2000) ("As Congress legislated its own Reconstruction policy, Johnson exercised his veto power, throwing up obstructions more often than had any previous President."). It thus seems unsurprising that he also vetoed Congress's attempt to prevent the Supreme Court from reviewing those laws. See Cong. Globe, 40th Cong., 2d Sess. 2094 (1868) (showing President vetoed bill on ground that it was "not in harmony with the spirit and intention of the Constitution"). Congress, however, also overrode that veto. *Id.* at 2128, 2170; see *infra* note 96 (discussing these events).

82. See *infra* Part II.A, D (discussing Roosevelt and Reagan Administrations).

83. This Part also focuses on cases in which there is publicly available information about the executive branch's views on jurisdiction stripping. Notably, these examples appear to reflect the executive branch's consistent practice. See 128 Cong. Rec. 9094 n.1 (1982) (letter from William French Smith, Att'y Gen. of the United States, to Sen. Strom Thurmond, Chairman, S. Judiciary Comm.) (stating "[t]he Department of Justice . . . has consistently opposed proposals to restrict Supreme Court jurisdiction" and citing both public records and internal DOJ documents); *infra* notes 322–325 and accompanying text (discussing DOJ's reliance on its own precedents).

84. See Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to Bill Clinton* 36–37, 288 (1997) (identifying Thomas Jefferson, Andrew Jackson, Abraham Lincoln, and Franklin Roosevelt as Presidents who "constituted a politics of reconstruction"); Whittington, *Foundations*, *supra* note 50, at 23 (naming Roosevelt among reconstructive Presidents who adopted a "departmentalist" stance to constitutional and political order).

85. See Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 Am. Pol. Sci. Rev. 511,

in a new “economic constitutional order.”<sup>86</sup> He offered the nation a “New Deal.”

Of course, the Supreme Court proved to be a substantial obstacle to President Roosevelt’s reconstruction. Although the Court upheld parts of what became the New Deal,<sup>87</sup> it also invalidated key portions.<sup>88</sup> For example, in *A.L.A. Schechter Poultry Corp. v. United States*, the Court struck down the National Industrial Recovery Act, the centerpiece of Roosevelt’s economic program.<sup>89</sup> At a press conference following the *Schechter* decision, President Roosevelt accused the Court of “relegat[ing]” the nation to the “horse-and-buggy” age of interstate commerce and potentially undermining every New Deal reform.<sup>90</sup> Although he declined to say “what [he was] going to do” in response to the decision, he noted that various proposals were being considered by “a central source—the Solicitor General and the Attorney General.”<sup>91</sup>

The President made few other public attacks on the Court during the next year and a half.<sup>92</sup> But the Roosevelt Justice Department was indeed working behind the scenes to find a solution to the “Court problem.” There were many ideas: suggestions for constitutional amendments, proposals to enlarge the size of the Supreme Court, and—most important for present purposes—efforts to curb federal jurisdiction.<sup>93</sup> Although some legislators sought to curtail the jurisdiction of the lower fed-

517–18 (2002) [hereinafter Gillman, *Agendas*] (detailing use of court appointments and institutional restructuring “to facilitate the Republican agenda of economic nationalism”).

86. Franklin D. Roosevelt, Campaign Address on Progressive Government at the Commonwealth Club (Sept. 23, 1932), in 1 *Public Papers and Addresses of Franklin D. Roosevelt* 742, 752 (Samuel I. Rosenman ed., 1938).

87. E.g., *Crowell v. Benson*, 285 U.S. 22, 62–63 (1932) (upholding Longshoremen’s and Harbor Workers’ Compensation Act); see also Larry D. Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 100 *Colum. L. Rev.* 215, 230 (2000) (stating that before 1937, Supreme Court “upheld most elements of what became the New Deal”).

88. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 311–12 (1936) (invalidating Bituminous Coal Conservation Act); *United States v. Butler*, 297 U.S. 1, 78 (1936) (striking down part of Agricultural Adjustment Act); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (invalidating central provisions of National Industrial Recovery Act on ground they only had an indirect effect on interstate commerce).

89. 295 U.S. at 551.

90. Franklin D. Roosevelt, The Two Hundred and Ninth Press Conference (May 31, 1935), in 4 *Public Papers and Addresses of Franklin D. Roosevelt*, supra note 86, at 200, 221.

91. *Id.*

92. See William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* 107 (1995) (noting Roosevelt’s reluctance to attack Supreme Court prior to 1936 election); Jeff Shesol, *Supreme Power: Franklin Roosevelt vs. the Supreme Court* 223–24 (2010) (noting Roosevelt’s awareness that “[h]istorically, election-year attacks on the Court were a losing proposition”).

93. See Leuchtenburg, supra note 92, at 102 (“‘The years 1935–1937,’ Michael Nelson has noted, ‘saw more Court-curbing bills introduced in Congress than in any other three-year (or thirty-five year) period in history.’” (quoting Michael Nelson, *The President and the Court: Reinterpreting the Court-Packing Episode of 1937*, 103 *Pol. Sci. Q.* 267, 273

eral courts (which had also struck down New Deal programs),<sup>94</sup> most proposals were targeted at the Supreme Court. For example, soon after the *Schechter* decision, former Senator Robert Owen contacted Roosevelt's first Attorney General Homer Cummings and suggested that Congress could, pursuant to the Exceptions Clause, restrict the Supreme Court's appellate jurisdiction over constitutional claims.<sup>95</sup>

Two Justice Department attorneys were assigned the task of examining such proposals to strip federal jurisdiction.<sup>96</sup> In a series of memoranda, Assistant Attorney General Alexander Holtzoff advised Attorney General Cummings that "[t]he decisions of the Supreme Court . . . support the view" that Congress could restrict—and even eliminate—the Supreme Court's appellate jurisdiction.<sup>97</sup> But he "greatly doubt[ed the] wisdom" of such a restriction.<sup>98</sup> Holtzoff was concerned in part about the need for uniformity on issues of constitutional law. He declared that "it would be a highly dangerous step to take away from the Supreme Court

(1988)); Shesol, *supra* note 92, at 203–04 (noting there were "more than a hundred" proposals to curb Supreme Court).

94. See Memorandum from Warner W. Gardner, Dep't of Justice, to the Solicitor Gen. 2 (Dec. 10, 1936) [hereinafter Gardner Memo, Dec. 10, 1936] (on file with the *Columbia Law Review*) (explaining "the proposal that Congress eliminate from the jurisdiction of the lower federal courts and from the appellate jurisdiction of the Supreme Court the power to pass upon the constitutionality of an act of Congress").

95. See Memorandum from Alexander Holtzoff, Dep't of Justice, to the Att'y Gen. 1–4 (June 6, 1935) [hereinafter Holtzoff Memo, June 6, 1935] (on file with the *Columbia Law Review*) (noting suggestion by Robert Owen, Democratic Senator from Oklahoma). Interestingly, no one seems to have suggested that the Court's jurisdiction be restricted in certain classes of cases. Thus, the DOJ analyzed Congress's power to limit—or eliminate—its appellate jurisdiction over all constitutional claims.

96. The attorneys focused in part on a precedent from the Reconstruction era. See *id.* at 1–2 (citing relevant cases from Reconstruction era); Memorandum from Warner W. Gardner, Dep't of Justice, to the Solicitor Gen. 5 (Aug. 15, 1935) [hereinafter Gardner Memo, Aug. 15, 1935] (on file with the *Columbia Law Review*) ("Perhaps the most dramatic instance of the extent of the congressional power to make exceptions from the appellate jurisdiction of the Court is to be found in *Ex parte McCardle* . . ."). In 1868, William McCardle was arrested by federal military authorities in the South for publishing newspaper articles that criticized the military's reconstruction activities. See William W. Van Alstyne, A Critical Guide to *Ex parte McCardle*, 15 *Ariz. L. Rev.* 229, 236 (1973) ("[McCardle] was charged . . . solely on the basis of several vituperative, anti-reconstructionist editorials he had authored and published in the *Times*."). When the lower courts denied habeas relief, McCardle sought Supreme Court review under the Habeas Corpus Act of 1867. *Id.* at 237. While the case was pending, Congress enacted (over President Andrew Johnson's veto) a statute that repealed the Court's appellate jurisdiction under the 1867 Act. Act of Mar. 27, 1868, ch. 34, 15 Stat. 44; Cong. Globe, 40th Cong., 2d Sess. 2128, 2170 (1868). In *Ex parte McCardle*, the Supreme Court upheld Congress's power to withdraw its appellate jurisdiction over the case. 74 U.S. (7 Wall.) 506, 515 (1868). But the Court emphasized that the statute had not cut off all avenues of Supreme Court review. *Id.* The Court later explained in *Ex parte Yeger* that it could still review lower court habeas decisions by way of an original habeas petition under the Judiciary Act of 1789. 75 U.S. (8 Wall.) 85, 105–06 (1868).

97. Holtzoff Memo, June 6, 1935, *supra* note 95, at 4.

98. *Id.* at 5.

the power” to review lower federal court decisions in constitutional cases, “for then we are likely to be confronted by a situation where a statute might be valid in one Circuit and invalid in another.”<sup>99</sup> In his view, the best way to address the problems created by the Supreme Court’s decisions was to adopt a constitutional amendment.<sup>100</sup>

Assistant Solicitor General Warner Gardner also analyzed proposals to eliminate the Supreme Court’s appellate jurisdiction. He found that, although Congress had broad power to restrict the Supreme Court’s jurisdiction,<sup>101</sup> there was an important limit on Congress’s authority. The Supreme Court’s “exercise of *judicial power* seems to be exempt from legislative interference under the separation of powers doctrine.”<sup>102</sup>

Gardner noted that it would be “difficult, of course, to fix the line which separates judicial power, which is immune from Congressional regulation, and appellate jurisdiction, over which Congress has control.”<sup>103</sup> But he found that it was unnecessary to determine “the precise limits of the judicial power,” because he concluded that the Supreme Court’s “immunity from legislative control includes the power to declare legislation unconstitutional.”<sup>104</sup> Thus, he stated:

It is abundantly clear that the members of the Federal Convention of 1787 viewed as one of the basic functions of the judiciary the power to declare legislation unconstitutional. . . . It would seem that a power apparently considered to be fundamental to the framework of our Government must be a judicial power rather than a mere incident of jurisdiction, subject to regulation and control by Congress.<sup>105</sup>

Gardner also considered whether Congress could strip inferior federal court jurisdiction over constitutional claims. Although the Supreme Court had often stated “in sweeping language” that Congress had essentially unlimited power over the lower courts,<sup>106</sup> he concluded (with some hesitation) that Congress could not strip jurisdiction over constitutional claims.<sup>107</sup> He stated that, even as to the lower courts, it seemed “relatively clear that the power of judicial review” was an “inherent attribute of the judicial power . . . beyond congressional control.”<sup>108</sup>

99. Memorandum from Alexander Holtzoff, Dep’t of Justice, to the Att’y Gen. 4–5 (June 22, 1935) (on file with the *Columbia Law Review*).

100. See *id.* at 5 (“I am inclined to the belief that a constitutional amendment is necessary in order to achieve the desired result.”).

101. Gardner Memo, Aug. 15, 1935, *supra* note 96, at 2–5.

102. *Id.* at 6 (emphasis added).

103. *Id.*

104. *Id.* at 10, 13.

105. *Id.* at 10–11.

106. Gardner Memo, Dec. 10, 1936, *supra* note 94, at 39.

107. See *id.* at 47 (stating it was “impossible to reach any certain conclusion” on this issue).

108. *Id.* (internal quotation marks omitted).



In subsequent months (and particularly after Roosevelt's landslide reelection in 1936), the President and Attorney General Cummings began to focus on alternative proposals, including suggestions that the President "pack" the Supreme Court.<sup>109</sup> The Attorney General asked Gardner to analyze the various proposals.<sup>110</sup> Gardner subsequently produced a lengthy memorandum, concluding that most of the suggestions—including, of course, the proposals to limit federal jurisdiction—were either unwise or unconstitutional (or both).<sup>111</sup> Ultimately, he determined that the proposal to enlarge the Supreme Court, while not without flaw, was "the only one which is certainly constitutional and . . . may be done quickly and with a fair assurance of success."<sup>112</sup> Indeed, it was the only "undoubtedly constitutional method by which to obtain a more sympathetic majority of the Court."<sup>113</sup>

President Roosevelt and Attorney General Cummings already favored the Court-packing idea, but Gardner's memo seemed to confirm the validity of the approach.<sup>114</sup> Cummings asked Gardner to draft the legislation that (after modifications by the Attorney General) became Roosevelt's famous Court-packing plan.<sup>115</sup>

The story of the Roosevelt Administration's approach to the judiciary thus reveals an apparent contradiction. Although the Roosevelt Justice Department strongly opposed efforts to strip federal jurisdiction, the DOJ not only supported but crafted what may be the most notorious Court-curbing bill in history.<sup>116</sup>

But the difference between these types of "court-curbing" measures may in fact say a great deal about the Article II safeguards of federal juris-

109. See Shesol, *supra* note 92, at 238, 242–43, 246–48 (discussing Roosevelt Administration's post-election deliberations on the judiciary).

110. See *id.* at 251–52 ("Cummings asked Gardner to consider every sensible alternative to amending the Constitution, and to report back after the election.")

111. Gardner Memo, Dec. 10, 1936, *supra* note 94, at 64–65 ("[I]n my opinion, the objections of constitutional policy and judicial administration out-weigh any advantages which it may offer."); see also *supra* notes 101–108 and accompanying text (describing Assistant Solicitor General Gardner's analysis of proposals to strip Supreme Court of appellate jurisdiction).

112. Gardner Memo, Dec. 10, 1936, *supra* note 94, at 57; see *id.* at 56 (noting policy objections, including that proposal could "mak[e] the court . . . unwieldy").

113. *Id.* at 65.

114. See Leuchtenburg, *supra* note 92, at 118 (stating "both the Attorney General and the President had been attracted to 'Court-packing' for a long time"); Shesol, *supra* note 92, at 253 (asserting "Cummings saw in Gardner's memo that which he wished to see—that which confirmed the trend of his own thinking").

115. See Shesol, *supra* note 92, at 253, 256 ("[Cummings] directed Gardner to draft a bill enlarging the Supreme Court.")

116. Of course, there were some dissenters within the Justice Department. Solicitor General Stanley Reed did not support the Court-packing proposal. See *id.* at 255–56 (noting Solicitor General Reed "distanced himself" from project, perhaps because of "simple discomfort at the idea of conspiring against the Court, when it was [his] job . . . to represent the government before those same justices" (internal quotation marks omitted)).

diction. As discussed, presidents have an incentive to preserve federal jurisdiction, because they can use the courts to advance their constitutional philosophy. Those same incentives lead presidents to appoint judges who are sympathetic to that philosophy. In short, presidents who seek to promote their constitutional views through the judiciary have a strong incentive to “pack” the federal courts. For that reason, as Professor Whittington has observed, “Roosevelt’s proposal to pack the Court with his supporters contained no provision requiring judicial restraint at all. . . . The administration hoped to harness the power of the Court, not destroy it.”<sup>117</sup>

Congress, in turn, seems to have rejected the Court-packing plan in order to prevent such executive “harnessing.” As Jeff Shesol asserts in his recent account of the Court-packing proposal, even Roosevelt’s Democratic supporters ultimately opposed the plan because they viewed it as a “power grab in the guise of reform.”<sup>118</sup> “The idea of giving any president . . . the authority to remake the Supreme Court virtually overnight was abhorrent.”<sup>119</sup>

The demise of the court-curbing proposals in the 1930s may thus be a tribute to the constitutional separation of powers. The executive branch resisted proposals to restrict federal jurisdiction and instead sought to “harness the power of the Court.” Congress, in turn, sought to prevent that from happening. Accordingly, “[a]mbition [was] made to counteract ambition” in a manner that protected the constitutional value in an independent judiciary.<sup>120</sup>

### B. *Jurisdiction-Stripping Efforts in the Eisenhower Administration*

The Supreme Court’s appellate review power once again became a subject of controversy during the Second Red Scare.<sup>121</sup> Although the Supreme Court initially steered clear of the controversy (or upheld the

117. Whittington, *Foundations*, supra note 50, at 266–67 (“Even as [the administration] sought to temporarily displace judicial authority, it was setting the stage for its reconstruction.”).

118. Shesol, supra note 92, at 315–16, 321 (noting opposition of Senate progressives was based on concerns about executive power); see Leuchtenburg, supra note 92, at 137 (observing some of Roosevelt’s opponents “compare[ed] [him] to Stuart tyrants and European dictators”); Skowronek, supra note 84, at 322–23 (“The specter of European autocrats . . . haunted this ‘dictator bill.’ . . . Congress . . . mounted its own defense of the Constitution against the arbitrary view of executive power it found so offensive in the President’s proposal.”).

119. Shesol, supra note 92, at 316.

120. *The Federalist* No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

121. See David Cate, *The Great Fear: The Anti-Communist Purge Under Truman and Eisenhower* 156–57 (1978) (noting Senate Internal Security Subcommittee’s claim that mid-1950s “Supreme Court decisions ‘have done more for enemy forces and objectives than might have been accomplished by any other agency or form of paralysis, [sic] short of the actual overthrow of government’” (quoting Benjamin Ginzburg, *Rededication to Freedom* 7 (1959))).

government's policies),<sup>122</sup> the Court in the mid-1950s issued a series of decisions that placed constraints on government investigations of suspected communists.<sup>123</sup> For example, in *Cole v. Young*, the Court began to scrutinize executive agency decisions to discharge allegedly "disloyal" employees.<sup>124</sup> And, in *Jencks v. United States*, the Court required federal prosecutors in criminal cases to turn over all relevant evidence about government witnesses to the defendants (the suspected "subversives").<sup>125</sup>

During this period, the nation was led by President Dwight Eisenhower. Social scientists have described Eisenhower as a "preemptive" president—a moderate conservative who came to power when the progressive politics of the post-New Deal era were still dominant.<sup>126</sup> In that environment, President Eisenhower was a pragmatic politician who was "personally sympathetic to conservative Republican ideals" but who "refused to take on New Deal liberalism" or to be controlled by the right wing of the Republican Party.<sup>127</sup>

President Eisenhower likewise took a pragmatic approach to the judiciary. He generally declined to take a strong stand either in favor of or in opposition to Warren Court civil liberties decisions.<sup>128</sup> Instead, President Eisenhower typically asserted that the federal judiciary was responsible for making legal decisions, and that his duty as President was to enforce those decisions, whether or not he agreed with them.<sup>129</sup>

In keeping with that general approach, President Eisenhower declined to publicly criticize the Supreme Court's decisions in these "sub-

122. See *Galvan v. Press*, 347 U.S. 522, 531–32 (1954) (upholding 1950 statute requiring deportation of members of Communist Party); *Carlson v. Landon*, 342 U.S. 524, 541–42 (1952) (upholding mandatory detention, without bail, of alleged Communists pending deportation); *Dennis v. United States*, 341 U.S. 494, 516–17 (1951) (holding Smith Act, which made it a crime to advocate overthrow of United States government, did not "violate the First Amendment [or] other provisions of the Bill of Rights").

123. See *Watkins v. United States*, 354 U.S. 178, 214–15 (1957) (holding witnesses appearing before House Committee on Un-American Activities could, without invoking Fifth Amendment, refuse to answer some questions); *Yates v. United States*, 354 U.S. 298, 312 (1957) (reversing convictions of defendants charged with conspiring to organize Communist Party in violation of Smith Act).

124. 351 U.S. 536, 557–58 (1956) (reversing dismissal of federal employee who was allegedly associated with subversive organization); see also *Service v. Dulles*, 354 U.S. 363, 388–89 (1957) (reversing discharge of foreign service officer with alleged ties to Communist Party).

125. 353 U.S. 657, 672 (1957).

126. Skowronek, *supra* note 84, at 46; see Whittington, *Foundations*, *supra* note 50, at 163 n.2 (agreeing with Skowronek that Eisenhower was a "preemptive" president).

127. Skowronek, *supra* note 84, at 46.

128. See *infra* note 130 (describing President Eisenhower's reticence to publicly criticize the Supreme Court's decisions in "subversive activity" cases).

129. See, e.g., President Dwight D. Eisenhower, *The President's News Conference of August 20, 1958*, 1958 Pub. Papers 621, 626 (stating, in response to question about whether he "personally favor[ed]" the Court's desegregation decisions, that he "always declined" to express opinion because he had obligation to enforce Supreme Court's judgments even if he "disagree[d] very violently with a decision").

versive activity” cases.<sup>130</sup> But his administration did not support the Court’s jurisprudence.<sup>131</sup> In several letters to Congress, President Eisenhower’s first Attorney General Herbert Brownell endorsed legislation to modify the *Cole v. Young* decision and to give federal agencies broader authority to terminate “disloyal” employees.<sup>132</sup> The DOJ was even more alarmed by the *Jencks* ruling. At a hearing, Attorney General Brownell told Congress that *Jencks*, at least as interpreted by the lower federal courts, had created “a grave emergency in law enforcement” and requested legislation to undo the decision.<sup>133</sup>

Many members of Congress were more vocal in their criticism.<sup>134</sup> In August 1957, Senator William Jenner introduced a bill to eliminate the Supreme Court’s appellate jurisdiction over a range of cases involving subversive activity.<sup>135</sup> He argued that the “so-called Warren Court” had

130. See President Dwight D. Eisenhower, The President’s News Conference of June 26, 1957, 1957 Pub. Papers 497, 503 (stating only that “in their latest series of decisions [in communism-related cases] there are some that each of us has very great trouble understanding”). He later referred to these (and criminal justice) decisions when he remarked that the appointment of Earl Warren was the “biggest mistake” he made as president. See 2 Stephen E. Ambrose, *Eisenhower: The President* 190 (1984).

131. Notably, the Eisenhower Administration was quite concerned about the perceived threat of global communism. See President Dwight D. Eisenhower, Annual Message to the Congress on the State of the Union, 1957 Pub. Papers 17, 28 (Jan. 10, 1957) (commenting on “the threat of Soviet aggression”); see also Caute, *supra* note 121, at 49 (“In his 1954 State of the Union message, Eisenhower himself went so far as to propose depriving Communists of citizenship.”).

132. The Court’s decisions had permitted such terminations only when an employee was in a “sensitive” position. The DOJ advocated legislation that would permit the dismissal of any allegedly “disloyal” employee, at least pending further study. See Federal Employees Security Program: Hearings Before the H. Comm. on Post Office and Civil Serv., 85th Cong. 140 (1957) (letter from Deputy Att’y Gen. William P. Rogers) (favoring enactment of bill to overrule *Cole v. Young*); Bill to Protect the Security of the United States by Preventing the Employment by the United States of Persons Found to be Disloyal to the United States: Hearing Before the H. Comm. on Post Office and Civil Serv., 84th Cong. 4–5 (1956) (letter from Att’y Gen. Herbert Brownell) (same).

133. Establishing Procedures for the Production of Government Records in Criminal Cases in United States Courts: Hearing Before the Subcomm. on Improvements in the Fed. Criminal Code of the S. Comm. on the Judiciary, 85th Cong. 8–9 (1958) (testimony of Att’y Gen. Herbert Brownell). Congress did later modify *Jencks*, and the Court upheld that new law. *Palermo v. United States*, 360 U.S. 343, 350–53 & n.11 (1959); see Caute, *supra* note 121, at 138 (noting Congress enacted legislation in response to *Jencks* ruling).

134. See, e.g., 104 Cong. Rec. 18,678 (1958) (statement of Sen. James Oliver Eastland) (contending Court’s “decisions . . . have effectively destroyed this Nation’s defense against [the communist] conspiracy”). Other legislators, however, rushed to the Court’s defense. See, e.g., *id.* at 18,679–80 (statement of Sen. Jacob Javits) (arguing “the maintenance of the proper balance between the Constitution and the laws made by Congress is at least as important as the effort” to root out Communists).

135. See Limitation of Appellate Jurisdiction of the United States Supreme Court: Hearing on S. 2646 Before the S. Subcomm. to Investigate the Admin. of the Internal Sec. Act and Other Internal Sec. Laws of the S. Comm. on the Judiciary, 85th Cong. 1–2 (1957) (statement of Sen. William E. Jenner) (noting bill sought to strip the Court’s appellate jurisdiction over (1) functions of congressional committees; (2) decisions by executive agencies to terminate disloyal employees; (3) any state law on subversive activity; (4) any

done much to “confuse, disarm and paralyze the people in their fight . . . against the world Communist conspiracy.”<sup>136</sup> Indeed, Senator Jenner complained, the Court had become “so befuddled as to hold” that a federal agency could not remove “a spy” from its employment roles.<sup>137</sup> He declared: “[W]hen [such] things have come to pass, . . . it is time to curtail the appellate jurisdiction of the Supreme Court . . . .”<sup>138</sup>

The Senate Judiciary Committee conducted hearings on the Jenner bill and invited Eisenhower’s second Attorney General William Rogers to comment on the measure.<sup>139</sup> Despite the administration’s concerns about the Court’s decisions, the Eisenhower Justice Department strongly opposed this jurisdiction-stripping bill. On March 4, 1958, Attorney General Rogers sent a letter to the Senate Judiciary Committee, “urg[ing] . . . the committee [to] report the bill adversely.”<sup>140</sup> The Attorney General stated that “[f]ull and unimpaired appellate jurisdiction in the Supreme Court is fundamental under our system of government.”<sup>141</sup> He emphasized in part the need for uniformity in the administration of federal law. “If this legislation should be enacted, constitutional questions . . . would be left for decision to the [various] Federal courts of appeal and the highest appellate court for each of the 48 States.”<sup>142</sup> But the Attorney General also worried about the effect of the measure on judicial independence.<sup>143</sup> He declared: “I am convinced that [the] enactment [of this bill] would be extremely detrimental to the proper administration of justice and harmful to our balanced system of government . . . .”<sup>144</sup>

Following the Senate Judiciary Committee hearing, Senator John Butler proposed an amended bill that eliminated most of the jurisdic-

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school board rule governing subversive activity among teachers; and (5) any state law pertaining to bar admissions).

136. *Id.* at 6.

137. *Id.* at 23.

138. *Id.*

139. Limitation of Appellate Jurisdiction of the United States Supreme Court: Hearing on S. 2646 Before the S. Subcomm. to Investigate the Admin. of the Internal Sec. Act and Other Internal Sec. Laws of the S. Comm. on the Judiciary, 85th Cong. 572–73 (1958) [hereinafter *Limitation of Appellate Jurisdiction Hearings 1958*].

140. *Id.* at 574 (letter from Att’y Gen. William P. Rogers to Sen. James O. Eastland, Chairman, S. Comm. on the Judiciary).

141. *Id.* at 573.

142. *Id.*

143. *Id.* at 574 (“The natural consequence . . . of such an enactment is that the courts would operate under the constant apprehension that if they rendered unpopular decisions, jurisdiction would be further curtailed.”).

144. *Id.*

tional restrictions.<sup>145</sup> But, ultimately, the Senate rejected this new “Jenner-Butler bill” in its entirety.<sup>146</sup>

### C. *Jurisdiction-Stripping Efforts in the Carter Administration*

The number of attacks on the federal judiciary exploded in the late 1970s (during the presidency of Jimmy Carter), largely in response to the constitutional jurisprudence of the Warren and Burger Courts. There were dozens of proposals to strip federal jurisdiction over constitutional claims ranging from school prayer and abortion to the use of busing to integrate public schools.<sup>147</sup>

Social scientists have described President Carter as a “disjunctive” leader who came to power at the tail end of a political era; in his case, it was the end of the progressive era originally ushered in by Franklin Roosevelt.<sup>148</sup> Like many “disjunctive” leaders, President Carter oversaw a deeply divided political party. The Democratic Party was split between social progressives, who favored the Court’s civil rights jurisprudence, and social conservatives (primarily from the South) who opposed it.<sup>149</sup> Thus, President Carter’s greatest challenge was maintaining this fractured coalition.<sup>150</sup>

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145. See 104 Cong. Rec. 18,646–51 (1958) (statement of Sen. John Butler) (“My amendment strikes out the [jurisdiction-stripping] language . . . leaving the withdrawal of jurisdiction applicable only in . . . one area . . .”). The new “Jenner-Butler” bill sought to remove the Supreme Court’s appellate jurisdiction in only one area—review of state court decisions on bar admissions. *Id.* at 18,647. Bar admissions became an area of controversy after the Court began to review state court decisions denying admission to suspected communists. See *Konigsberg v. State Bar*, 353 U.S. 252, 273 (1957) (“We recognize the importance of leaving States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such a way as to impinge on the freedom of political expression or association.”). Notably, the NAACP was strongly opposed to the elimination of the Court’s appellate jurisdiction in this area. The organization was concerned that state courts would use that freedom from Supreme Court supervision to bar civil rights attorneys from practicing law in their states. See *Limitation of Appellate Jurisdiction Hearings 1958*, *supra* note 139, at 486–92 (statement of Clarence Mitchell, Director of the Washington Bureau of the NAACP) (“If [civil rights opponents] succeed in choking off the court action, having already choked off other possible avenues of redress, . . . they will effective [sic] prevent people from getting any kind of redress.”).

146. See 104 Cong. Rec. 18,687 (1958) (showing Senate defeated measure by vote of 49-41).

147. See Edward Keynes & Randall K. Miller, *The Court vs. Congress: Prayer, Busing, and Abortion 195–203*, 221–22, 292–98 (1989) (discussing attempts to strip Court’s jurisdiction over cases relating to school prayer, busing, and abortion, respectively).

148. See Skowronek, *supra* note 84, at 361–62, 365 (describing “Jimmy Carter’s Disjunction”—a time when “liberalism was on the defensive”).

149. See Whittington, *Foundations*, *supra* note 50, at 66, 268–69 (describing Carter’s difficulties reconciling differences between Democratic progressives and conservatives on social issues).

150. See *id.* at 66 (“Carter faced a particularly daunting task of maintaining an increasingly frayed party coalition, while also keeping faith with the political image and concerns that brought him to the presidency in the first place.”).

Perhaps for this reason, as political scientist Stephen Skowronek has explained, President Carter gained a reputation for “fuzziness” on controversial issues.<sup>151</sup> For example, while President Carter courted the vote of the religious right in 1976 by emphasizing his own born-again Christianity, he declined to support their efforts to reinstate prayer in school.<sup>152</sup> Likewise, although Carter declared that he was “personally against abortion,” he treated the issue as a “legal” matter for the courts to decide.<sup>153</sup> He thus declined to support efforts to ban abortion.<sup>154</sup>

The Carter Justice Department was, however, somewhat less “fuzzy” on jurisdiction stripping. In April 1979, while the Senate was considering a proposal by Senator Jesse Helms to eliminate federal jurisdiction over school prayer cases,<sup>155</sup> Attorney General Griffin Bell sent a letter to Congress urging them to reject the measure. The Attorney General stated that any proposal to strip federal jurisdiction over constitutional claims was “ill-advised as a matter of constitutional law and of public policy,” because “[m]atters of constitutional interpretation and adjudication are . . . pre-eminently within the province of the Federal judiciary.”<sup>156</sup> But Bell was especially concerned about the proposed limitation on the Supreme Court’s appellate jurisdiction. Although he declined (at that point) to take a position on Congress’s power to enact such a measure, he

151. Skowronek, *supra* note 84, at 372 (“[T]he more [Carter] attempted to . . . clarify his position publicly, the more dissonance people heard, and by the end of the 1976 primary campaign, he was already stamped indelibly with a debilitating reputation for ‘fuzziness.’”).

152. See Andrew R. Flint & Joy Porter, *Jimmy Carter: The Re-Emergence of Faith-Based Politics and the Abortion Rights Issue*, 35 *Presidential Stud. Q.* 28, 32, 35 (2005) (asserting “Christian conservatives quickly became disillusioned with the Carter presidency,” in part because of “his failure to support mandatory prayer in public schools”).

153. Carter explained that “as President [he took] an oath to uphold the laws . . . as interpreted by the Supreme Court . . . So, if the [Court] should rule, as they have, on abortion and other sensitive issues contrary to [his] own personal beliefs, [he had] to carry out” that ruling. Remarks and a Question-and-Answer Session During a Live Television Broadcast, 3 *Pub. Papers* 2348, 2354 (Oct. 20, 1980).

154. See Flint & Porter, *supra* note 152, at 35 (noting “Christian conservatives quickly became disillusioned with the Carter presidency,” in part because of “his failure to . . . move to ban abortion”).

155. See Louis Fisher, *Religious Liberty in America: Political Safeguards* 130 (2002) (noting Senator Jesse Helms “took the lead in promoting this type of court-stripping bill”). The bill provided:

[T]he Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari, or otherwise, any case arising out of any State [law] . . . which relates to voluntary prayers in public schools and public buildings. . . . [T]he district courts shall not have jurisdiction of any case or question which the Supreme Court does not have the jurisdiction to review under [the above provision].

125 *Cong. Rec.* 7577 (1979).

156. Letter from Griffin B. Bell, *Att’y Gen.*, to Hon. Abraham Ribicoff, *Chairman, Comm. on Gov’t Operations, U.S. Senate* (April 9, 1979), in 125 *Cong. Rec.* 7636–37 (1979). Although Attorney General Bell’s letter specifically addressed the school prayer bill, his analysis was not limited to that proposal. See *id.*

made clear that any such law would be unwise. The elimination of Supreme Court review would “run afoul of the public interest in . . . a uniform, definitive and dispositive nation-wide resolution of issues of constitutional magnitude.”<sup>157</sup>

The Senate ultimately passed the jurisdiction-stripping bill, and the measure went to the House Judiciary Committee.<sup>158</sup> The Carter Justice Department then provided its views on the constitutionality of the proposal. As Assistant Attorney General John Harmon explained at a subcommittee hearing, the DOJ believed that the school prayer measure was “unconstitutional to the extent that it would purport to divest the Supreme Court of . . . jurisdiction.”<sup>159</sup>

The Carter Justice Department endorsed Professor Hart’s “essential role” theory and concluded that it would be “difficult to conceive of a more essential role for the Court than to preserve the unity of our constitutional law.”<sup>160</sup> Accordingly, the school prayer proposal was “unconstitutional because it impinge[d] on the essential role of the Supreme Court.”<sup>161</sup> Harmon declared that he was “confident” the DOJ would recommend that President Carter “veto” any bill containing such a jurisdiction-stripping provision.<sup>162</sup>

The school prayer bill ultimately died in the House Judiciary Committee.<sup>163</sup> No other jurisdiction-stripping bill made it to the floor of either the House or the Senate during the Carter Administration. But legislators continued to propose such bills after President Carter left office in 1981.<sup>164</sup>

157. *Id.* at 7637.

158. 125 Cong. Rec. 7657 (1979).

159. Prayer in Public Schools and Buildings—Federal Court Jurisdiction: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary, 96th Cong. 14 (1980) (Department of Justice memorandum for Assistant Att’y Gen. Alan A. Parker); see *id.* at 19–20 (statement of John Harmon, Assistant Att’y Gen., Office of Legal Counsel, U.S. Department of Justice) (“[T]he exception that would be created by the enactment of the ‘school prayer amendment’ . . . would violate the supremacy clause of the Constitution, article VI, clause 2, and therefore would be unconstitutional.”).

160. *Id.* at 16–17 (Department of Justice memorandum for Assistant Att’y Gen. Alan A. Parker).

161. *Id.* at 17.

162. *Id.* at 23 (statement of John Harmon, Assistant Att’y Gen., Office of Legal Counsel, U.S. Department of Justice).

163. Keynes & Miller, *supra* note 147, at 200.

164. See *id.* at 195–203, 221–25, 292–98 (discussing attempts to strip Court’s jurisdiction over cases relating to school prayer, busing, and abortion, respectively); Max Baucus & Kenneth R. Kay, The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress, 27 *Vill. L. Rev.* 988, 992–94 (1982) (recounting efforts to strip federal jurisdiction over abortion, busing, and school prayer in early 1980s).



D. *The Reagan Era: Continuing Opposition to Jurisdiction Stripping*

Social scientists have described Ronald Reagan as the most recent “reconstructive” leader.<sup>165</sup> President Reagan articulated a new economic and social policy that differed sharply from the politics of the progressive leaders in the post-New Deal era. He sought to redefine the role of the federal government by reducing government regulation of the economy and enhancing the powers of the several states.<sup>166</sup>

President Reagan also articulated a more socially conservative stance on constitutional issues. He was deeply skeptical of the civil rights jurisprudence of the Warren and Burger Courts. Thus, throughout his presidency, Reagan strongly criticized the Supreme Court’s decisions on school prayer, busing, and abortion.<sup>167</sup> For example, President Reagan “express[ed] profound disappointment” with the Court’s abortion decisions and “call[ed] on the Congress to make its voice heard against abortion on demand . . . whether by statute or constitutional amendment.”<sup>168</sup> Likewise, Reagan asserted that “the decision that prevented voluntary prayer by anyone who wanted to do so in a school or a public building is just not in keeping with the Constitution at all.”<sup>169</sup>

The Reagan Justice Department actively promoted the President’s pledge for a new and more socially conservative constitutional jurisprudence.<sup>170</sup> Reagan’s first Attorney General William French Smith denounced the federal courts’ “activist” constitutional rulings.<sup>171</sup> During his tenure, the DOJ (through Solicitor General Rex Lee) urged the Court to moderate its school prayer jurisprudence.<sup>172</sup> And Reagan’s second Attorney General Ed Meese challenged not only the Court’s decisions but judicial supremacy itself. Thus, Meese articulated a departmentalist view of constitutional interpretation, arguing that if the President believed the

165. See, e.g., Skowronek, *supra* note 84, at 414–15 (discussing President Reagan’s “reconstructive posture”).

166. See *id.* at 415 (noting Reagan promised to “releas[e] the creative energies of the private sector” by deregulating business); Whittington, *Foundations*, *supra* note 50, at 275 (“Central to Reagan’s constitutional vision was a more limited national government.”).

167. See Remarks at a Reagan-Bush Rally in Charlotte, N.C., 2 *Pub. Papers* 1465, 1466 (Oct. 8, 1984) (“[B]using . . . takes innocent children out of the neighborhood school and makes them pawns in a social experiment that nobody wants. We’ve found out it failed.”).

168. Statement on the United States Supreme Court Decision on Abortion, 1 *Pub. Papers* 876, 876 (June 16, 1983).

169. Interview with Eleanor Clift, Jack Nelson, and Joel Havemann of the *Los Angeles Times*, 1 *Pub. Papers* 825, 830 (June 23, 1986) [hereinafter Clift Interview].

170. See Rebecca Mae Salokar, *The Solicitor General: The Politics of Law 76* (1992) (noting Reagan Administration “coined a new term in . . . the solicitor general’s office, ‘agenda cases,’” which included cases involving abortion, prayer, and busing).

171. Lincoln Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law* 66–67 (1987); see also Nancy V. Baker, *Conflicting Loyalties: Law and Politics in the Attorney General’s Office, 1789–1990*, at 170 (1992) (stating Attorney General Smith “share[d] the policy agenda of the [Reagan] administration”).

172. See Fisher, *supra* note 155, at 133 (noting Reagan Administration asked Court to “take a fresh look” at school prayer decisions (internal quotation marks omitted)).

federal courts erred in their constitutional judgments, he had a responsibility to advance his opposing view.<sup>173</sup> During Meese's tenure, the Justice Department advanced the President's view on abortion when it (through Solicitor General Charles Fried) filed amicus briefs expressly calling for the reversal of *Roe v. Wade*.<sup>174</sup>

In this environment, one might have expected the Reagan Administration to favor efforts to strip federal jurisdiction, at least in the areas of jurisprudence that the President had so roundly criticized.<sup>175</sup> But the Reagan Justice Department took the same basic approach as its predecessors. Attorney General Smith explained the DOJ's position in a May 1982 letter to Congress (which he separately published as an official Office of Legal Counsel opinion).<sup>176</sup>

Attorney General Smith asserted that Congress lacked the power to strip the Supreme Court's jurisdiction over constitutional claims.<sup>177</sup> He acknowledged that, under the plain language of the Exceptions Clause, there was "no doubt that Congress possesses some power to regulate the appellate jurisdiction of the Supreme Court."<sup>178</sup> But he insisted that "Congress may not . . . consistent with the Constitution, make 'exceptions' to Supreme Court jurisdiction which would intrude upon [its] core functions . . . as an independent and equal branch in our system of separation of powers."<sup>179</sup>

Smith further argued that, even if Congress had the power to eliminate the Supreme Court's appellate jurisdiction, it should not do so. He emphasized the importance of the Supreme Court in preserving the uniformity and supremacy of federal law, declaring that "[t]he integrity of

173. See Edwin Meese III, *The Law of the Constitution*, 61 *Tul. L. Rev.* 979, 985–86 (1987).

174. See Brief for the United States as Amicus Curiae in Support of Appellants at 2, *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (Nos. 84-495, 84-1379), 1985 WL 669620 at \*2 (asserting "*Roe v. Wade* is so far flawed . . . that this Court should reconsider that decision and . . . abandon it").

175. Legislators continued to propose bills involving abortion, school prayer, and busing. See Keynes & Miller, *supra* note 147, at 195–203, 221–25, 292–98 (discussing attempts to strip Court's jurisdiction over cases relating to school prayer, busing, and abortion, respectively); see also Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 *Harv. C.R.-C.L. L. Rev.* 129, 149 (1981) (noting one abortion bill sought to eliminate both Supreme Court and lower federal court jurisdiction).

176. See 128 *Cong. Rec.* 9093, 9093–97 (1982) (letter from William French Smith, Att'y Gen., to Sen. Strom Thurmond, Chairman, S. Comm. on the Judiciary) (explaining DOJ's position that Congress may not withdraw jurisdiction on public prayer issues completely from federal courts); *Constitutionality of Legislation Withdrawing Supreme Court Jurisdiction to Consider Cases Relating to Voluntary Prayer*, 6 *Op. O.L.C.* 13, 13–26 (1982) (same).

177. Although Attorney General Smith's letter specifically addressed a school prayer provision, he did not limit his analysis to such a proposal. See 128 *Cong. Rec.* at 9093–97.

178. *Id.* at 9093.

179. *Id.*

our system of federal law depends upon a single court of last resort having a final say on the resolution of federal questions.”<sup>180</sup>

Attorney General Meese endorsed these statements during his confirmation hearings.<sup>181</sup> Senator Max Baucus asked him about measures “to limit the Supreme Court[’s] jurisdiction over, say, school prayer, busing, abortion, the right to bear arms, any provision that is contained in the Constitution . . . .”<sup>182</sup> Meese stated that he agreed with his predecessor that Congress lacks the power to “diminish or take away the core functions of the Supreme Court,” including the power to rule on constitutional claims.<sup>183</sup> Meese declared that if he believed that a bill infringed on “a core function of the Supreme Court,” then he “would recommend a veto.”<sup>184</sup>

The Reagan Justice Department also opposed bills that would eliminate inferior federal court jurisdiction over constitutional claims.<sup>185</sup> Attorney General Meese explained that, although Congress “has a greater latitude” over lower court jurisdiction, it would be unwise for Congress to exercise that power.<sup>186</sup> The judicial system could become very unstable if Congress “chang[ed] . . . jurisdiction based upon what may be in vogue at a particular time.”<sup>187</sup> Thus, he believed that, as a general rule, Congress should not “limit lower Federal court jurisdiction over a Federal constitutional question.”<sup>188</sup>

180. *Id.* at 9097 (asserting “[s]tate courts could reach disparate conclusions on identical questions of federal law” and that, absent Supreme Court oversight, there would be “no guarantee . . . that state courts [would] accord appropriate supremacy to federal law”).

181. See *Nomination of Edwin Meese III: Hearing Before the S. Comm. on the Judiciary, 98th Cong. 185–86 (1984)* [hereinafter *Meese Nomination Hearing*].

182. *Id.* at 185 (statement of Sen. Max Baucus, Member, S. Comm. on the Judiciary).

183. *Id.* at 185 (statement of Edwin Meese III) (stating such measure “would be unwise as well as impermissible under the Constitution”).

184. *Id.* at 186.

185. See *Limitations on Court-Ordered Busing—Neighborhood School Act: Hearing on S. 951 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary, 97th Cong. 166 (1982)* (statement of Theodore B. Olson, Assistant Att’y Gen., Office of Legal Counsel, Department of Justice) (stating DOJ recommended against proposals that would “take classes of cases out of the jurisdiction” of lower federal courts). The Reagan Administration took a more nuanced view of what it saw as proposals to limit the lower federal courts’ remedial power, supporting a proposal to restrict their authority to order busing in school desegregation cases. See *id.* at 131–34. But, notably, the DOJ interpreted the measure so as to exempt the Supreme Court. See *id.* at 133–34. In the DOJ’s view, the validity of the busing measure would be “far more debatable” if it applied to the Supreme Court’s appellate jurisdiction. *Id.* at 134.

186. *Meese Nomination Hearing*, *supra* note 181, at 185 (statement of Edwin Meese III).

187. *Id.*

188. *Id.* Meese expressed this view in response to a question from Senator Baucus: Senator Baucus. So, as I understand your answer, then, you think it is clearly unconstitutional for Congress to attempt to prevent the Supreme Court from having jurisdiction over a Federal constitutional question and that it is probably

Given President Reagan's declarations that the Supreme Court's civil rights jurisprudence was "just not in keeping with the Constitution at all" (views that were shared by his Attorneys General),<sup>189</sup> the Reagan Justice Department's opposition to jurisdiction-stripping legislation seems remarkable. Yet there may be no inconsistency. The Reagan Justice Department had an alternative way of addressing what it viewed as the Supreme Court's constitutional errors.

As Attorney General Smith explained in his May 1982 letter, the DOJ sought to "remedy . . . judicial overreaching," not by restricting federal jurisdiction, but instead by challenging the courts' constitutional rulings through litigation.<sup>190</sup> Likewise, Meese argued that one of the best ways for the President to express his alternative constitutional vision was through litigation.<sup>191</sup> "A lawsuit . . . can help clarify the law by better defining its edges. It can also give the Court an opportunity for rethinking a previous holding."<sup>192</sup> President Reagan indicated his support for this approach, when he declared that "[i]n many areas—abortion, crime, pornography, and others—progress will take place [only] when the Federal judiciary is made up of judges who believe in law and order and a strict interpretation of the Constitution" and promised to nominate federal judges "who share[d] the fundamental values" of his administration.<sup>193</sup>

Thus, much like his reconstructive predecessor during the New Deal, President Reagan had little reason to favor restrictions on federal jurisdiction.<sup>194</sup> He sought (over time, of course) to "pack" the Supreme Court and the lower federal courts with judges who would be sympathetic to his

unwise for Congress to attempt to limit lower Federal court jurisdiction over a Federal constitutional question.

Mr. Meese. I would say as a general rule, yes, Senator. Obviously as to the latter part, the lower Federal courts, it would depend clearly on the specific case, the specific subject, and the specific proposal.

Id.

189. Clift Interview, *supra* note 169, at 830; see *supra* notes 167–174 and accompanying text (describing Reagan Administration's stances on civil rights and constitutional issues).

190. 128 Cong. Rec. 9093–94 (1982) (letter from William French Smith, Att'y Gen., Dep't of Justice, to Sen. Strom Thurmond, Chairman, S. Comm. on the Judiciary) ("The Department of Justice will continue, through its litigating efforts, to urge the courts not to intrude into areas that properly belong to the State legislatures and to Congress.").

191. See Edwin Meese III, *The Tulane Speech: What I Meant*, 61 Tul. L. Rev. 1003, 1006–07 (1987) [hereinafter Meese, Speech] ("A lawsuit thus can help clarify the law by better defining its edges.").

192. *Id.* at 1006.

193. Remarks by Telephone to the Annual Convention of the Knights of Columbus in Chicago, Illinois, 2 Pub. Papers 1053, 1055 (Aug. 5, 1986); see Goldman, *supra* note 52, at 285 (arguing Reagan, like Roosevelt, "self-consciously attempted to use the power of judicial appointment to place on the bench judges who shared [his] general philosophy").

194. See *supra* notes 109–115 and accompanying text (describing Roosevelt's court-packing plan).

constitutional vision.<sup>195</sup> The Reagan Justice Department could then use litigation to “give [this new judiciary] an opportunity for rethinking a previous holding.”<sup>196</sup> In short, much like President Roosevelt, Reagan sought to “harness the power of the [federal judiciary], not destroy it.”<sup>197</sup>

As this historical survey demonstrates, the executive branch has repeatedly used its constitutional authority in the legislative process to oppose legislation targeted at the Supreme Court’s appellate review power or at federal jurisdiction over constitutional claims. During the Roosevelt era, legislators waited for the President to recommend “[m]easures [that] he . . . judge[d] necessary and expedient”<sup>198</sup> to address the “problem” created by the Supreme Court’s rejection of New Deal legislation. The Roosevelt Administration used this authority to reject jurisdiction-stripping proposals and to suggest an alternative that would have been more beneficial to the executive branch. In later years, the Carter and Reagan Justice Departments explicitly invoked the threat of a presidential veto.

Furthermore, this historical evidence indicates that the DOJ’s preference for Supreme Court review is reinforced by the executive branch’s interest in the uniform enforcement of federal law. It is extremely expensive and administratively cumbersome if state court or lower federal court decisions require the federal government to enforce federal law differently in different regions of the country.<sup>199</sup> Perhaps for this reason, the Carter Justice Department underscored the need for Supreme Court review to protect “the public interest in . . . a uniform, definitive and dispositive nation-wide resolution of issues of constitutional magnitude.”<sup>200</sup> Likewise, the Reagan Administration warned that, absent Supreme Court oversight, “[s]tate courts could reach disparate conclusions on identical questions of federal law” and declared that “[t]he integrity of our system of federal law depends upon a single court of last resort having a final say on the resolution of federal questions.”<sup>201</sup>

Accordingly, various administrations—with vastly different views of and approaches to the federal judiciary—have found it in their interest to protect the scope of federal jurisdiction. The executive branch has thus

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195. See *supra* notes 185–188 and accompanying text (describing Reagan Administration’s advocacy of broad lower federal court jurisdiction for constitutional issues).

196. Meese, *Speech*, *supra* note 191, at 1006.

197. Whittington, *Foundations*, *supra* note 50, at 267.

198. U.S. Const. art. II, § 3.

199. Indeed, the government often seeks certiorari on this basis. See, e.g., *Brief for the United States at 11, Lockhart v. United States*, 546 U.S. 142 (2005) (No. 04-881), 2005 WL 460918, at \*11 (arguing “[t]his Court’s review is warranted to resolve [a] direct circuit conflict, which prevents the uniform administration of . . . the federal student loan program”).

200. 125 Cong. Rec. 7637 (1979) (letter from Att’y Gen. Griffin B. Bell).

201. 128 Cong. Rec. 9097 (1982) (letter from Att’y Gen. William French Smith).

proven, in the legislative process, to be an important ally for the federal courts.

### III. ARTICLE II SAFEGUARDS IN LITIGATION

The executive branch has repeatedly opposed jurisdiction-stripping bills, and most such proposals have been killed in the legislative process. The executive branch's opposition has not, however, been absolute. Instead, in recent decades (as discussed further in Part IV), some jurisdiction-stripping measures have been enacted into law with the President's assent.

But, even after a bill becomes law, the executive branch has a second constitutional tool to protect the federal judiciary. Under the Take Care Clause of Article II, the executive branch maintains control over the enforcement of that law.<sup>202</sup> The Justice Department has often used this authority to urge narrow constructions of jurisdiction-stripping measures in order to preserve the Supreme Court's appellate jurisdiction and federal jurisdiction over constitutional claims.

#### A. *Construing Limits on the Supreme Court's Appellate Jurisdiction*

As David Cole has observed, the political branches in 1996 "broke the taboo" on jurisdiction-stripping legislation with the enactment of several statutes, including the Antiterrorism and Effective Death Penalty Act (AEDPA)<sup>203</sup>—a law that completely overhauled federal habeas litigation.<sup>204</sup> Notably, AEDPA was enacted with the strong support of President Bill Clinton. Social scientists have described Clinton as a "preemptive" president, who came to power when the conservative era ushered in by President Reagan was still dominant.<sup>205</sup> Like many preemptive leaders, Clinton adopted a "hybrid" form of politics that integrated the views of both progressives and moderate conservatives.<sup>206</sup> Clinton's support for

202. See U.S. Const. art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed . . .").

203. David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 *Geo. L.J.* 2481, 2482 & n.7 (1998); see *Antiterrorism and Effective Death Penalty Act*, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 28 U.S.C.).

204. AEDPA curtailed the scope of federal habeas review of state criminal convictions and significantly cut back on multiple habeas filings. See 28 U.S.C. §§ 2244, 2254 (2006) (laying out rules to govern habeas review).

205. See Skowronek, *supra* note 84, at 449 (asserting Clinton "lack[ed] the authority to challenge fundamentally the terms in which legitimate national government ha[d] come to be understood in the post-Reagan era," and "[h]is leadership [was] preemptive rather than reconstructive"); Whittington, *Foundations*, *supra* note 50, at 163 & n.2 (agreeing with Skowronek that Clinton was a "preemptive" president).

206. See Skowronek, *supra* note 84, at 449, 451 (arguing "[t]he distinctive thing about preemptive leaders is that they are not out to establish, uphold, or salvage any political orthodoxy . . . . These leaders bid openly for a hybrid alternative," and arguing Clinton's label of "'New' Democrats" illustrated this "hybrid" approach).

anticrime legislation was central to this hybrid approach.<sup>207</sup> Thus, in signing AEDPA into law, President Clinton expressed support for many of the habeas reforms, stating that he had “long sought to streamline Federal appeals” in capital cases.<sup>208</sup> He did not, however, comment on the jurisdiction-stripping provisions in AEDPA.

One of those provisions restricts the Supreme Court’s appellate review power. AEDPA requires an inmate to obtain leave from a federal court of appeals before filing a second (or successive) habeas petition and provides that “[t]he grant or denial of [such] an authorization . . . shall not be appealable and shall not be the subject of a petition . . . for a writ of certiorari.”<sup>209</sup>

Soon after the enactment of AEDPA, a capital defendant in Georgia (Ellis Wayne Felker) challenged this provision. The Supreme Court granted certiorari, ordered expedited briefing and argument, and invited the Solicitor General to file a brief “expressing the views of the United States.”<sup>210</sup> The Court directed the parties to address the following issues:

- (1) Whether [the appellate review provision of AEDPA] . . . is an unconstitutional restriction of the jurisdiction of this Court.
- (2) Whether and to what extent [the provision applies] to petitions for habeas corpus filed as original matters in this Court pursuant to 28 U.S.C. § 2241.<sup>211</sup>

In the litigation, the parties seemed to agree that AEDPA restricted the Supreme Court’s appellate jurisdiction in one respect. The statute prevented the Court from entertaining a direct appeal from a prisoner who was denied leave to file a successive habeas petition.<sup>212</sup> The primary issue of contention was whether the statute cut off all avenues to the Court and, if so, whether such a limitation was constitutional. Thus, the debate centered on whether AEDPA should be read to prevent a habeas petitioner from filing an “original” petition in the Supreme Court under 28 U.S.C. § 2241. (The Court had long treated such habeas petitions as

207. See *id.* at 455 (“Clinton, determined to erase any doubt that a Democrat could be tough on crime, endorsed provisions for the death penalty [and] for stiffer . . . sentencing.”); Whittington, *Foundations*, *supra* note 50, at 5, 206–07 (stating Clinton “buil[t] a domestic policy record on such traditionally Republican issues as deficit reduction, crime fighting, and welfare reform”).

208. Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 1 Pub. Papers 630, 631 (Apr. 24, 1996).

209. 28 U.S.C. § 2244(b)(3)(E).

210. *Felker v. Turpin*, 517 U.S. 1182, 1183 (1996). The Solicitor General treats such an “invitation” as a directive from the Court. *Pacelle*, *supra* note 69, at 45.

211. *Felker*, 517 U.S. at 1182–83. The Court also instructed the parties to address whether the Act violated the Suspension Clause of Article I, section 9. *Id.* at 1183.

212. See, e.g., Brief for the Petitioner at 11–12, *Felker v. Turpin*, 518 U.S. 651 (1996) (No. 95-8836), 1996 WL 272389, at \*11–\*12 [hereinafter Brief for Petitioner, *Felker*] (arguing prisoner lacks “recourse . . . in this Court on ordinary certiorari review”).

part of its appellate jurisdiction, but such petitions were nonetheless known as “original” writs.<sup>213</sup>)

The State of Georgia argued that the statute cut off all avenues to the Supreme Court. Accordingly, when an appellate court refused to authorize a successive petition, a prisoner could not seek further review.<sup>214</sup> The State’s position was supported by an amicus brief filed by a bipartisan group of legislators, including the Senate sponsor of AEDPA.<sup>215</sup> The legislators asserted that Congress had ample power to eliminate the Court’s appellate jurisdiction over this class of habeas cases.<sup>216</sup> They further emphasized that one of the principal purposes of AEDPA was to reduce the delay caused by multiple appeals of state convictions.<sup>217</sup> That purpose would be undermined if the Court permitted successive habeas petitions to be filed as original writs.<sup>218</sup> Indeed, “[i]nterpreting § 2241 in that manner would nullify the gatekeeper provision of the Antiterrorism Act.”<sup>219</sup>

By contrast, *Felker* (supported by several amici) urged the Supreme Court to construe the appellate review restriction narrowly so as to preserve its original habeas jurisdiction.<sup>220</sup> *Felker* argued that, if the statute were construed “to bar all review by this Court . . . it [would be] unconstitutional,” because it would impermissibly undermine the Court’s “essential role.”<sup>221</sup>

213. See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100–01 (1807) (concluding “original” habeas action was exercise of Court’s appellate jurisdiction because it involved “revis[ing] [the] decision of an inferior court”). One might argue that, given this interpretation, the plain text of the statute—that a lower court gatekeeping decision “shall not be appealable”—barred “original” habeas actions. 28 U.S.C. § 2244(b)(3)(E). But no party made that precise argument.

214. See Transcript of Oral Argument at 35, *Felker*, 518 U.S. 651 (No. 95-8836) (“QUESTION: So that means—I mean, the practical effect of [your argument], the[n], is that our original jurisdiction is, in fact, gone. MS. BOLEYN: Yes.”).

215. See Brief for Senator Orrin G. Hatch et al. as Amici Curiae Supporting Respondent at 3, *Felker*, 518 U.S. 651 (No. 95-8836), 1996 WL 277110, at \*3 (“Th[e] Court should not construe [AEDPA] as allowing petitioner to file a habeas petition to seek review of the judgment below . . . .”); *id.* at 2 (“Amicus Orrin Hatch was the primary sponsor . . . in the Senate . . . .”).

216. See *id.* at 15 (arguing “Congress can modify appellate jurisdiction granted to this Court in habeas cases” (citing *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869))).

217. See *id.* at 4, 22–25 (stating Congress was “frustrated by lengthy delays in the execution of validly imposed capital sentences” and arguing “repetitive challenges to a prisoner’s conviction or sentence have become the norm in capital cases”).

218. See *id.* at 29 (arguing courts of appeals’ gatekeeping decisions are meant to be “final” and thus “it makes no sense to conclude that this Court” may still review such actions under § 2241).

219. *Id.* at 29.

220. Brief for Petitioner, *Felker*, *supra* note 212, at 10–12; see, e.g., Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Georgia in Support of Petitioner at 5, *Felker*, 518 U.S. 651 (No. 95-8836) (contending “nothing in the language of the new Act even purports to limit this Court’s jurisdiction over habeas actions under 28 U.S.C. § 2241”).

221. See Brief for Petitioner, *Felker*, *supra* note 212, at 8, 26.



The DOJ (through Solicitor General Drew Days) likewise urged the Supreme Court to construe the jurisdictional limitation narrowly to permit original habeas petitions under § 2241.<sup>222</sup> In its brief, the government discussed in detail the academic debate over Congress's power to limit the Court's jurisdiction.<sup>223</sup> Although the DOJ declined to take a firm position on that debate in *Felker*,<sup>224</sup> it did note that Attorney General Smith had endorsed the "essential role" theory.<sup>225</sup> The government declared that it was unnecessary for the Court to resolve that "difficult and important constitutional issue[ ]," because AEDPA complied with all "the prevailing theories" of Congress's power over federal jurisdiction.<sup>226</sup> The DOJ emphasized that the statute (narrowly construed) was consistent with the "essential role" theory because it left open an avenue for the Court "to serve as expositor of the federal constitutional rules governing criminal prosecutions."<sup>227</sup>

The Supreme Court ultimately adopted that narrow construction. In *Felker v. Turpin*, the Court declared that, although AEDPA prohibited a direct appeal from a lower court "gatekeeping" decision, it had "not repealed [the Court's] authority to entertain original habeas petitions."<sup>228</sup> While this "reservation of authority" may have seemed at the time like a fairly empty gesture (since the Court had not granted an original habeas petition in decades),<sup>229</sup> recent events have demonstrated the importance of this protection. In August 2009, the Court in *In re Davis* granted an original petition in a capital case and directed the federal district court to consider the inmate's claim of actual innocence.<sup>230</sup>

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222. See Brief for the United States as Amicus Curiae at 11–12, *Felker*, 518 U.S. 651 (No. 95-8836) [hereinafter Brief for United States, *Felker*] ("Title I of the Act . . . does not divest this Court of its jurisdiction to entertain original petitions for habeas corpus.").

223. See *id.* at 24–27 (stating "legislative consideration of various jurisdiction-stripping proposals . . . has precipitated considerable scholarly discussion," and asserting "[u]nder any of the prevailing theories, Title I of the Act is constitutional").

224. Notably, any such position would undermine the Solicitor General's ability to defend the constitutionality of AEDPA, if the Supreme Court rejected its narrow interpretation.

225. See Brief for United States, *Felker*, *supra* note 222, at 25–26 ("[S]cholars . . . have argued that Congress may not . . . prevent the Court from performing its 'core' or 'essential' functions . . . . That view was more recently articulated by then-Attorney General William French Smith.").

226. *Id.* at 13.

227. *Id.* at 26.

228. 518 U.S. at 660–61.

229. See Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and the Federal System* 271, 298–99 (6th ed. 2009) (noting narrowness of standards for issuing original writs and rarity of such issuances).

230. *In re Davis*, 130 S. Ct. 1, 1 (2009). On remand, the district court held that Davis failed to establish innocence by clear and convincing evidence. See *In re Davis*, No. CV409-10, 2010 WL 3385081, at \*1 (S.D. Ga. Aug. 24, 2010). Davis's appeal of that ruling was denied, see *Davis v. Terry*, 625 F.3d 716, 719 (11th Cir. 2010), cert. denied, 131 S. Ct. 1787 (2011), and he was ultimately executed. See Kim Severson, *Georgia Inmate Executed; Raised Racial Issue in Death Penalty*, N.Y. Times, Sept. 21, 2011, at A1.

The Solicitor General's position may not, of course, have necessarily led the Supreme Court to adopt this narrow construction of AEDPA. But the government's approach did assure the Court that, if it were inclined to interpret the restriction narrowly, that interpretation would have the support of a coequal branch of the federal government.

### B. *Federal Jurisdiction over Constitutional Claims*

The Justice Department has also urged the courts to construe legislation narrowly in order to preserve federal jurisdiction over at least constitutional claims. This practice (much like the government's position in *Felker*) invites the federal courts to avoid potentially difficult constitutional questions about the scope of Congress's power over federal jurisdiction.

1. *Early Examples: The Johnson, Nixon, and Reagan Justice Departments.*—Prior to 1996, Congress enacted few statutes that were widely viewed as “jurisdiction-stripping” laws. But many of the same issues did arise in the context of judicial review of federal administrative action. The following examples illustrate both the promise—and the limitations—of the Article II safeguards in litigation.

The scope of federal jurisdiction became salient during the Vietnam War era, when various individuals challenged their eligibility for the draft. For example, in *Oestereich v. Selective Service Board*, a divinity school student argued that, under the relevant statutes, he was exempt from military service and that the local selective service agency had called him up solely to punish him for protesting the war.<sup>231</sup> He filed suit, alleging violations of both the statute and his free speech rights under the First Amendment, seeking to enjoin his induction into military service.<sup>232</sup>

A provision of the Military Selective Service Act of 1967, however, seemed to foreclose the lawsuit. The statute provided: “No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution.”<sup>233</sup>

During both the Johnson and the Nixon Administrations, the DOJ (through Solicitor General Erwin Griswold) argued for a narrow construction of this provision.<sup>234</sup> The DOJ noted that the statute appeared to

231. *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233, 234–35 (1968). The statute did, in fact, exempt the student from immediate military service. See *id.* at 234 n.1 (“Regular or duly ordained ministers of religion . . . and students preparing for the ministry . . . shall be exempt from training and service (but not from registration) under this title.” (quoting Military Selective Service Act of 1967, Pub. L. No. 90-40, § 6(g), 81 Stat. 100 (codified as amended at 50 U.S.C. app. § 456 (g) (2006)))).

232. *Id.* at 234–35.

233. Military Selective Service Act § 8(c), 81 Stat. at 104 (emphasis added).

234. See Brief for the Respondents at 13–14 & n.7, *Fein v. Selective Serv. Sys. Local Bd. No. 7*, 405 U.S. 365 (1972) (No. 70-58) (arguing Congress intended to preserve habeas remedy “to test the validity of induction”).

permit review only in the context of a criminal proceeding.<sup>235</sup> But the law would thereby leave a jurisdictional gap: anyone who submitted to induction (and, thus, committed no crime) would have no avenue for judicial review.

The DOJ asserted that the statute should not be construed to preclude judicial oversight in such cases. The government argued that, “despite [its] sweeping language . . . this provision is subject to an exception or qualification in that review may be had, after induction, not only through a criminal prosecution but also by habeas corpus.”<sup>236</sup> The government acknowledged that “no such qualification is stated in the sweeping language of the statute.”<sup>237</sup> Indeed, habeas petitions would “surely [be] a means of ‘judicial review’ other than by ‘criminal prosecution.’”<sup>238</sup> But there was some evidence in the legislative history that Congress had not intended to preclude the preexisting scheme of habeas review.<sup>239</sup> Moreover, the DOJ noted, this narrow construction was necessary to “avoid the constitutional problem that would arise if the statute were construed to bar habeas corpus.”<sup>240</sup>

The Justice Department also urged the Court to create an even broader exception for an individual like *Oestereich* with a strong constitutional and statutory challenge to induction.<sup>241</sup> The DOJ recommended that, in such a case, the Court should permit immediate review under 28 U.S.C. § 1331.<sup>242</sup> (This latter concession was especially remarkable because Congress had enacted the jurisdictional restriction largely to over-

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235. See Brief for the Respondents at 22 & n.7, *Oestereich*, 393 U.S. 233 (No. 46) [hereinafter Brief for Respondents, *Oestereich*] (arguing, although provision “does not explicitly preserve the habeas corpus remedy,” it “expressly provides for review after . . . induction,” and “such review could only be by habeas corpus”).

236. *Id.* at 60 (emphasis in original).

237. *Id.*

238. *Id.*

239. See *id.* at 22 n.7, 60 (explaining “[t]he legislative history of Section 10(b)(3) shows that Congress intended to preserve the generally prevailing law with respect to judicial review of Selective Service classifications”). The legislative history indicated that Congress sought to preclude only pre-induction review. See H.R. Rep. No. 90-267, at 30 (1967) (“The committee was disturbed by the apparent inclination of some courts to review the classification action of local . . . boards before the registrant had exhausted his administrative remedies.”).

240. Brief for Respondents, *Oestereich*, *supra* note 235, at 60; see *id.* at 22 n.7 (stating if law barred habeas review, it might violate Suspension Clause).

241. See *id.* at 62–66 (“It is enough here to conclude that the statutory provisions involved can best be reconciled by permitting petitioner to maintain a pre-induction suit . . . in view of the whole complex of factors here . . . including . . . the constitutional doubts which might be raised on these particular facts.”).

242. See *id.* at 13–14, 66 (explaining “the statutory provisions involved can best be reconciled by permitting petitioner to maintain a pre-induction suit”).

turn a court of appeals decision allowing such pre-induction review,<sup>243</sup> and because the Selective Service itself opposed such review.<sup>244</sup>)

The Supreme Court agreed with the Justice Department's construction. The Court noted that "[n]o one . . . suggests that [the Act] can sustain a literal reading. For while it purports on its face to suspend the writ of habeas corpus . . . everyone agrees that such was not its intent."<sup>245</sup> The Court thus held that the statute was "unambiguous" in permitting "judicial review . . . in a criminal prosecution or, as the Government concedes, [via] habeas corpus after induction."<sup>246</sup> The Court further held that, in exceptional cases like *Oestereich*, the plaintiff could seek immediate relief in district court under § 1331.<sup>247</sup>

In *Webster v. Doe*, by contrast, the DOJ argued that the relevant statutes foreclosed all judicial review of administrative action.<sup>248</sup> *Webster* in-

243. See *Wolff v. Selective Serv. Local Bd. No. 16*, 372 F.2d 817, 820 (2d Cir. 1967) (finding "the threat to First Amendment rights is of such immediate and irreparable consequence . . . as to require prompt action by the courts"); see also Ralph Reiser, *The Conscientious Objector Exemption: Administrative Procedures and Judicial Review*, 35 U. Chi. L. Rev. 686, 704 (1968) (noting after court in *Wolff* permitted a pre-enforcement suit by two student war protesters, "Congress attempted to nullify even this narrow exception" for cases with "free speech and association implications, in the 1967 Act").

244. The DOJ separately presented the agency's views in the government's brief. See Brief for Respondents, *Oestereich*, supra note 235, at 7, 66-74.

245. *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233, 238 (1968).

246. *Id.* at 235; see *Fein v. Selective Serv. Sys. Local Bd. No. 7*, 405 U.S. 365, 374-75 (1972) (adopting same construction).

247. See *Oestereich*, 393 U.S. at 237-39 (holding "petitioner must have the opportunity to . . . demonstrate that he meets the jurisdictional requirements of 28 U.S.C. § 1331").

248. 486 U.S. 592 (1988). That was also true in *Johnson v. Robison*, 415 U.S. 361 (1974). In *Johnson*, the plaintiff, a conscientious objector who had performed "alternative civilian service" during the Vietnam War, sought veterans' benefits to pay for law school. *Id.* at 362-64. Under the statute, such benefits were available only to those who had served on active duty, so the Veterans Administration denied his claim. See *id.* at 363-64. The plaintiff filed suit, challenging this statutory limitation on equal protection and free exercise grounds. See *id.* at 364. The relevant statute provided:

[T]he decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration . . . shall be final and conclusive and no . . . court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

*Id.* at 365 n.5 (quoting provision in effect at that time).

In *Johnson* and a companion case, the Nixon Justice Department argued that this provision precluded federal jurisdiction over the plaintiff's constitutional claims. Brief for the Appellants at 21-28, *Johnson*, 415 U.S. 361 (No. 72-1297) [hereinafter Brief for Appellants, *Johnson*]; see Brief for the Respondents at 9, *Hernandez v. Veterans' Admin.*, 415 U.S. 391 (1974) (No. 72-700) (arguing "even prior to its amendment in 1970, Section 211(a) would have barred judicial review of petitioners' constitutional contentions"). But the DOJ emphasized the limited nature of its argument. Congress could limit jurisdiction over a constitutional claim only in a case involving government benefits, not one involving regulatory authority. See *id.* at 9-10 & n.4 (arguing limitation of judicial review is permissible "when administrative action involves no assertion of power over an individual, either to compel his compliance with a duty or to deprive him of liberty or property"); see also Brief for Appellants, *Johnson*, supra, at 27 ("The Administrator's action involved no present or potential exercise of governmental power against appellee; it merely withheld

volved a suit by a former employee of the Central Intelligence Agency who was allegedly terminated for security reasons.<sup>249</sup> The plaintiff employee asserted that he was instead fired because he had informed his supervisor that he was gay.<sup>250</sup> He brought suit under the Administrative Procedure Act (APA), challenging his termination on both statutory and constitutional grounds.<sup>251</sup>

The Reagan Justice Department (through Solicitor General Charles Fried) argued that the courts lacked jurisdiction even over Doe's constitutional claims.<sup>252</sup> The DOJ noted that the APA prevents courts from reviewing actions that are "committed to agency discretion by law."<sup>253</sup> Here, the relevant statute (the National Security Act) provided that "[t]he Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee . . . whenever he shall deem such termination necessary or advisable in the interests of the United States."<sup>254</sup> This provision, the DOJ urged, committed termination decisions to the unreviewable discretion of the CIA.<sup>255</sup>

The DOJ recognized that, so construed, the statute raised constitutional concerns.<sup>256</sup> But the government emphasized that "the national security context in which the statute operates . . . distinguish[es] this case from the far broader and much debated issue of legislative restriction of federal court jurisdiction."<sup>257</sup> Given "the risks posed by judicial inquiry into [CIA personnel decisions], . . . judicial review of national security dismissals must be deemed precluded, even for . . . constitutional claims."<sup>258</sup> Notably, however, the Justice Department did identify one limitation on Congress's authority over federal jurisdiction, even in this national security context. The government stated: "[W]hether a particular

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from him . . . an advantage he desires."). Ultimately, the Supreme Court held that this provision did not preclude jurisdiction over a constitutional challenge. See *Johnson*, 415 U.S. at 366–67, 373–74 (holding provision "is inapplicable to this action"); *Hernandez*, 415 U.S. at 393 (holding provision "does not bar judicial consideration of constitutional challenges").

249. *Webster*, 486 U.S. at 595.

250. *Id.* at 595–96.

251. *Id.* He alleged in part violations of his privacy and equal protection rights. *Id.* at 596.

252. See Brief for the Petitioner at 9–10, *Webster*, 486 U.S. 592 (No. 86-1294) [hereinafter Brief for Petitioner, *Webster*] (summarizing argument that court lacks jurisdiction for statutory and policy reasons).

253. *Id.* at 31 (quoting 5 U.S.C. § 701(a) (1982) (internal quotation marks omitted)).

254. *Webster*, 486 U.S. at 594 (quoting National Security Act of 1947, Pub. L. No. 80-253, § 102(c), 61 Stat. 495, 498 (codified as amended at 50 U.S.C. § 403(c) (1982))) (internal quotation marks omitted). The current version of the statute, which gives the CIA Director the same basic authority, is codified at 50 U.S.C. § 403-4a(e)(1) (2006).

255. Brief for Petitioner, *Webster*, *supra* note 252, at 11–32.

256. See *id.* at 33 (defending constitutionality of denial of judicial remedy to former CIA employee).

257. *Id.* at 33–34.

258. *Id.* at 44.

preclusion of review is constitutional is itself a constitutional question, review of which may not be precluded.”<sup>259</sup>

The Court in *Webster* found that the National Security Act (combined with the APA) precluded review of the plaintiff’s statutory claims.<sup>260</sup> But the same language was not sufficient to prevent review of constitutional issues. “[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. . . . Nothing in [these statutes] persuades us that Congress meant to preclude consideration of colorable constitutional claims . . . .”<sup>261</sup>

*Webster* demonstrates that the Justice Department has not always advocated a narrow construction of statutes that seem to preclude judicial review. But the Court’s decision in *Webster* (and similar cases)<sup>262</sup> did present a potential opportunity for the DOJ. To the extent that subsequent administrations were inclined to argue for narrow interpretations of jurisdictional restrictions, such arguments would be substantially supported by the Court’s clear-statement rule in *Webster*. Indeed, future Justice Departments did rely on that case in urging the federal judiciary to adopt narrow constructions of far more explicit jurisdiction-stripping laws.

2. *The Clinton and George W. Bush Administrations.* — The appellate-review provision in the Antiterrorism and Effective Death Penalty Act (AEDPA) was not its only controversial jurisdictional restriction.<sup>263</sup> The statute, along with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),<sup>264</sup> purported to eliminate all federal jurisdiction over certain deportation cases.

AEDPA (enacted on April 24, 1996) provided: “Any final order of deportation against an alien who is deportable by reason of [a conviction

259. Reply Brief for the Petitioner at 15, *Webster*, 486 U.S. 592 (No. 86-1294) [hereinafter Reply Brief for Petitioner, *Webster*].

260. 486 U.S. at 600–01 (concluding statute allowing termination of CIA employee “whenever the Director ‘shall deem [it] necessary . . . ,’ not simply when the dismissal is necessary . . . ,” appeared “to foreclose the application of any meaningful judicial standard of review” (quoting National Security Act of 1947, § 102(c), 61 Stat. at 498)).

261. *Id.* at 603–05 (remanding constitutional claim to district court). The Court had articulated a similar clear-statement rule in a few prior cases. See *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 680–81 & n.12 (1986) (expressing reluctance to assume Congress intended no review of constitutional claims without clear and convincing evidence); *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975) (same); *Johnson v. Robison*, 415 U.S. 361, 373–74 (1974) (same). But, notably, in only one of those cases had the DOJ specifically argued that the Court lacked jurisdiction over a constitutional claim. See *supra* note 248 (discussing *Johnson*); see also *Weinberger*, 422 U.S. at 786–87 (Brennan, J., dissenting) (criticizing majority opinion sharply for discussing jurisdictional issue, given that issue “was not raised in this Court by the parties”); Brief for the Petitioners at 17, *Bowen*, 476 U.S. 667 (No. 85-225) (arguing Court “need not decide” whether Congress precluded review of constitutional claims because claims at issue were too “insubstantial to support . . . jurisdiction in any event”).

262. See *supra* note 261 (discussing *Bowen*, *Weinberger*, and *Johnson*).

263. See *supra* Part III.A (discussing AEDPA).

264. Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C.).

for certain enumerated crimes] shall not be subject to review by any court.”<sup>265</sup> On September 30, 1996, Congress enacted IIRIRA and crafted a new jurisdiction-stripping provision to replace the one in AEDPA: “Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed [certain] criminal offense[s] . . . .”<sup>266</sup>

The statutes thus appeared to eliminate all federal jurisdiction over the claims of this class of undocumented immigrants. The legislative history supported that interpretation. Senator Spencer Abraham, the sponsor of the restriction in IIRIRA, declared that the law was designed to “end judicial review for orders of deportation entered against these criminal aliens.”<sup>267</sup>

These provisions provoked considerable scholarly interest.<sup>268</sup> Congress had finally enacted a jurisdiction-stripping law that seemed to raise one of the most fundamental concerns of the court-curbing literature: Congress’s power to strip all federal jurisdiction over a class of cases.

However, as Ernest Young put it, “a funny thing happened on the way to the courthouse.”<sup>269</sup> From the outset of the litigation over these provisions, the DOJ repeatedly conceded that the federal courts retained jurisdiction over federal constitutional claims.<sup>270</sup> Indeed, the DOJ argued that the provisions “should be interpreted as preserving review” of consti-

265. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(a), 110 Stat. 1214, 1276–77 (codified as amended at 8 U.S.C. § 1105(a)(10) (2006)).

266. IIRIRA § 306(a), 110 Stat. at 3009-607 to 3009-608 (codified as amended at 8 U.S.C. § 1252). Another provision of IIRIRA channeled any available challenges to the courts of appeals. See *id.* § 306(b), 110 Stat. at 3009-610 (codified as amended at 8 U.S.C. § 1252(b)(9)) (“Judicial review of all questions of law and fact . . . arising from any action . . . to remove an alien . . . shall be available only in judicial review of a final order . . . .”). Congress amended these provisions in 2005 to expressly restore federal jurisdiction over constitutional and other legal claims. See REAL ID Act of 2005, Pub. L. No. 109-13, § 106(a), 119 Stat. 302, 310 (codified as amended at 8 U.S.C. § 1252) (“Nothing in . . . this Act . . . shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals . . . .”).

267. 142 Cong. Rec. 10,052 (1996) (statement of Sen. Spencer Abraham).

268. See, e.g., Cole, *supra* note 203, at 2482 (“[A]t least since 1869, Congress’s threats to curtail federal jurisdiction have been for the most part just that—empty threats. . . . But in 1996, Congress broke the taboo on such legislation . . . .”); Vicki C. Jackson, Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy, 86 *Geo. L.J.* 2445, 2447 (1998) (agreeing 1996 legislation “call[ed] for renewed attention to the problem” of jurisdiction stripping); Ernest A. Young, Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review, 78 *Tex. L. Rev.* 1549, 1554 (2000) (“When the AEDPA [and] the IIRIRA . . . burst on the scene in 1996, it appeared that some of the much-mooted questions concerning the limits of Congress’s power over federal jurisdiction might at long last be answered.”).

269. Young, *supra* note 268, at 1554.

270. See David M. McConnell, Judicial Review Under the Immigration and Nationality Act: Habeas Corpus and the Coming of REAL ID (1996–2005), 51 *N.Y.L. Sch. L. Rev.* 75, 90 (2006–2007) (“Notwithstanding the broadly worded judicial review bars . . . ,

tutional claims.<sup>271</sup> “Notwithstanding [IIRIRA]’s categorical language, neither the text nor the legislative history . . . adverts specifically to preclusion of review of constitutional claims . . . .”<sup>272</sup> Accordingly, the DOJ urged, the courts “retain authority to consider such claims.”<sup>273</sup>

The federal courts willingly accepted the government’s concession that they retained jurisdiction over constitutional claims. Thus, the D.C. Circuit declared that it “need not decide” whether the 1996 laws eliminated jurisdiction over constitutional issues, “because . . . the Government concedes” that judicial review “remains available [for deportees] . . . to raise substantial constitutional questions.”<sup>274</sup> Likewise, given the government’s “conce[ssion] that federal courts must have jurisdiction to hear claims of substantial constitutional error,” the Tenth Circuit “assumed that federal courts retained some sort of jurisdiction to hear [such] claims.”<sup>275</sup>

The DOJ’s position significantly altered the nature of the litigation over AEDPA and IIRIRA. The main issue was not whether Congress could foreclose all judicial review for this class of claimants. Instead, the litigation focused on the proper forum for review and the scope of review. The government contended that judicial review should take place in the courts of appeals and should be limited to constitutional claims and “jurisdictional facts” (i.e., ensuring that the deportee was in fact convicted of a crime that triggered the jurisdictional bar).<sup>276</sup> By contrast, the immigrants sought a more expansive review via habeas corpus actions in federal district court.<sup>277</sup> But no one claimed, as Senator Abraham had as-

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the government argued from the outset . . . that criminal aliens could still challenge their deportation and removal orders . . . on constitutional grounds.”).

271. Brief for Respondent at 9–10, *Flores-Miramontes v. INS*, 212 F.3d 1133 (9th Cir. 1999) (No. 98-70924), 1999 WL 33631399, at \*9–\*10 (citing *Webster v. Doe*, 486 U.S. 592, 603 (1988)) (emphasis added).

272. Brief for the Respondent at 23, *Calcano-Martinez v. INS*, 533 U.S. 348 (2001) (No. 00-1011), 2001 WL 327595, at \*23 [hereinafter Brief for Respondent, *Calcano-Martinez*].

273. *Id.* Notably, this language comes from a brief ultimately filed by the second Bush Administration. See *infra* note 281 and accompanying text (noting that Bush Justice Department took same approach as Clinton Administration).

274. *Ramallo v. Reno*, 114 F.3d 1210, 1214 (D.C. Cir. 1997); see *Singh v. Reno*, 182 F.3d 504, 509 (7th Cir. 1999) (noting “[t]he government concedes that the 1996 Amendments did not extinguish judicial review altogether” and concluding “direct review in the courts of appeals remains an option for aliens wishing to challenge their deportation on constitutional grounds”).

275. *Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1144 n.4 (10th Cir. 1999).

276. See Brief for Respondent at 67–71, *Calcano-Martinez v. INS*, 232 F.3d 328 (2d Cir. 2000) (Nos. 98-4033, 98-4214, 98-4246), 2000 WL 33977917, at \*67–\*71 (arguing no Suspension Clause violation because of availability of review).

277. See Brief for the Respondent at 7, *INS v. St. Cyr*, 533 U.S. 289 (2001) (No. 00-767), 2001 WL 324615, at \*7 (arguing district courts retained jurisdiction to review “pure question[s] of law” in habeas proceeding under 28 U.S.C. § 2241).



serted, that Congress “end[ed] judicial review for orders of deportation entered against these criminal aliens.”<sup>278</sup>

Ultimately, the Supreme Court resolved the issues of forum and scope of review. In *INS v. St. Cyr* and *Calcano-Martinez v. INS*, the Court held (contrary to the government’s position) that district courts retained jurisdiction to review all legal challenges to removal via habeas corpus.<sup>279</sup> Notably, in the opinion for the Court in *Calcano-Martinez*, Justice Stevens remarked that even the government had not contended that AEDPA and IIRIRA foreclosed all judicial review. He found it “instructive that the Government acknowledge[d] that background principles of statutory construction and constitutional concerns must be considered in determining the scope of [the] jurisdiction-stripping provisions.”<sup>280</sup>

This executive branch practice continued during the George W. Bush Administration (at least outside the context of the war on terror, which is discussed below in Part IV). The Bush Justice Department not only retained the government’s arguments in the AEDPA and IIRIRA litigation,<sup>281</sup> but it also applied the same approach in other cases—conceding federal jurisdiction over constitutional claims.<sup>282</sup>

*Demore v. Kim* offers a nice illustration.<sup>283</sup> *Demore* involved a lawful permanent resident alien (Hyung Joon Kim) who was awaiting deportation.<sup>284</sup> Kim had applied for bail and his application was denied by the Immigration and Naturalization Service pursuant to 8 U.S.C. § 1226(c), which requires the detention, without bail, of any deportee who was convicted of an “aggravated felony.”<sup>285</sup> Kim argued that this “mandatory de-

278. 142 Cong. Rec. 10,052 (1996) (statement of Sen. Spencer Abraham).

279. See *Calcano-Martinez v. INS*, 533 U.S. 348, 349–50 (2001) (“[P]etitioners must . . . proceed with their petitions for habeas corpus if they wish to obtain relief.”); *St. Cyr*, 533 U.S. at 314 (holding “habeas jurisdiction under § 2241 was not repealed by AEDPA and IIRIRA”).

280. *Calcano-Martinez*, 533 U.S. at 350 n.2.

281. The Supreme Court briefs in *St. Cyr* and *Calcano-Martinez* were filed after the change in administrations. But the Bush Justice Department maintained the same litigation position. See *supra* note 273. Although it would have been extremely unusual for the government to change positions midstream, it would not have been unprecedented. See Caplan, *supra* note 171, at 82 (observing Reagan Justice Department “switch[ed] sides” in busing case left over from Carter era); Pacelle, *supra* note 69, at 40 (noting such reversals are rare).

282. See, e.g., Brief for the Respondents at 12–13, *Whitman v. Dep’t of Transp.*, 547 U.S. 512 (2005) (No. 04-1131), 2005 WL 2738321, at \*12 (arguing although Civil Service Reform Act generally “provides the exclusive remedy” for federal employee grievances, “[i]f a grievance raises a substantial constitutional claim that . . . [cannot be addressed through that scheme], the CSRA should not be construed to preclude” review of claim); see also *Whitman*, 547 U.S. at 515 (per curiam) (remanding case to court of appeals to address various issues that may “obviate the need to decide [the] more difficult question of preclusion”).

283. 538 U.S. 510 (2003).

284. *Id.* at 513–14.

285. *Id.* at 513–14 & n.1 (citing 8 U.S.C. § 1226(c)(1) (2000)). The INS was then part of the Department of Justice and thus acting under the authority of the Attorney General.

tion” provision was unconstitutional as applied to lawful permanent residents.<sup>286</sup>

An amicus brief filed by two private organizations and a group of legislators asserted that the federal courts lacked jurisdiction over the case.<sup>287</sup> The amici relied on the following provision:

The Attorney General’s discretionary judgment regarding the application of [§ 1226] shall not be subject to review. *No court may set aside any action or decision by the Attorney General under this section* regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.<sup>288</sup>

The amici argued that “the only plausible reading of [this provision] is that Congress intended to prohibit federal courts from ‘set[ting] aside’ the INS’s detention of Mr. Kim and other similarly situated criminal aliens.”<sup>289</sup>

The DOJ’s briefs were silent on the potential jurisdictional defect. Instead, the government simply urged the Supreme Court to uphold the statute on the merits.<sup>290</sup> But, at the oral argument in *Demore*, Justice Scalia brought up the jurisdictional issue in questioning Solicitor General Ted Olson:

General Olson, do—do we have authority to entertain this challenge? As you know, an amicus has raised a jurisdictional question . . . .

The problem is section 1226(e) . . . . Now, is that provision, number one, inapplicable or, number two, unconstitutional? And if neither of those, why doesn’t it mean that we have no authority to entertain this case?<sup>291</sup>

The question led to the following exchange:

See INS—Immigration and Naturalization Service, Immigration Direct, <http://www.immigrationdirect.com/immigration-articles/index.html> (on file with the *Columbia Law Review*) (last visited Nov. 11, 2011) (noting INS became part of DOJ in 1940).

286. *Demore*, 538 U.S. at 514–15.

287. See Brief of Washington Legal Foundation; Allied Educational Foundation; U.S. Reps. Bob Barr, Joe Barton, John Doolittle, Walter Jones, and Lamar Smith; and U.S. Senator Jesse Helms as Amici Curiae in Support of Petitioners at 5, *Demore*, 538 U.S. 510 (No. 01-1491), 2002 WL 2008201, at \*5 [hereinafter *Demore* Amicus Brief] (“[T]he lower courts did not possess jurisdiction to overturn the INS’s decision to detain Mr. Kim.”).

288. 8 U.S.C. § 1226(e) (emphasis added); *Demore* Amicus Brief, *supra* note 287, at 5.

289. *Demore* Amicus Brief, *supra* note 287, at 8 (quoting 8 U.S.C. § 1226(e)).

290. See Brief for the Petitioner at 9, *Demore*, 538 U.S. 510 (No. 01-1491), 2002 WL 31016560, at \*9 (arguing Congress reasonably concluded “mandatory detention . . . is necessary to implement its immigration policies”). The DOJ’s only apparent reference to the jurisdictional issue was the following statement in its reply brief: “The government does not dispute the availability of judicial review for compliance with the Due Process Clause in this case.” Reply Brief for the Petitioners at 6, *Demore*, 538 U.S. 510 (No. 01-1491), 2002 WL 31969024, at \*6.

291. Transcript of Oral Argument at 3–4, *Demore*, 538 U.S. 510 (No. 01-1491) [hereinafter Transcript of Oral Argument, *Demore*], available at [http://www.supremecourt.gov/oral\\_arguments/arguments\\_transcripts/01-1491.pdf](http://www.supremecourt.gov/oral_arguments/arguments_transcripts/01-1491.pdf) (on file with the *Columbia Law Review*).

MR. OLSON: Justice Scalia, it's the Government's position . . . that that provision does not apply to a habeas corpus challenge to the constitutionality of the statute itself . . . .

. . . .

QUESTION: And—and you're relying on what language to—

MR. OLSON: Well, we're relying on the language that . . . refers to . . . administrative actions[ ] by the Attorney General or immigration . . . officials, and this Court's construction of statutes against precluding constitutional challenges to other statutes.

QUESTION: Oh, but all of those other statutes had some wiggle room I think, even *St. Cyr*, and there just is no wiggle room here. . . . It simply says, no court may set aside any action by the Attorney General under this section.

. . . .

MR. OLSON: . . . [W]hile it would be in the Government's interest to preclude this challenge at all, we think a fair reading of the Court's decisions . . . would be to construe that statute as not to preclude this action in this case. Of course, . . . your construction would lead to a—a victory on behalf of the Government in this case, but we've carefully examined it, and . . . we're not advocating that position here today.<sup>292</sup>

Justice O'Connor later raised the jurisdictional issue with Kim's counsel, noting that the Court could address the matter, "despite the Government's failure to raise it."<sup>293</sup> Justice O'Connor asked: "[W]hy doesn't section 1226 tell the courts to keep hands off?"<sup>294</sup> Kim's counsel responded: "We agree with the Solicitor General's explanation."<sup>295</sup> Justice O'Connor replied (provoking laughter from the audience): "I have to tell you I don't understand it. I thought maybe you'd enlighten me there."<sup>296</sup>

Ultimately, by a 6-3 majority, the Supreme Court held that it had jurisdiction over the case.<sup>297</sup> The Court emphasized that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear."<sup>298</sup> Under that standard, § 1226(e) did "not bar [Kim's] constitutional challenge."<sup>299</sup> The Court then, by a different 5-4 majority, went on to uphold the statute on the merits.<sup>300</sup> (Justice O'Connor, in a

292. *Id.* at 4–6.

293. *Id.* at 27–28.

294. *Id.*

295. *Id.*

296. *Id.* Kim's counsel stated that, because "[the] statute contains no express language that repeals habeas jurisdiction," the federal courts retained such jurisdiction. *Id.*

297. *Demore*, 538 U.S. at 516–17.

298. *Id.* at 517 (quoting *Webster v. Doe*, 486 U.S. 592, 603 (1988)) (internal quotation marks omitted).

299. *Id.*

300. See *id.* at 513 (holding "Congress, justifiably concerned that deportable criminal aliens . . . fail to appear for their removal hearings in large numbers, may require"

separate opinion joined by Justices Scalia and Thomas, dissented from the jurisdictional holding, but concurred in the judgment on the merits.<sup>301</sup>)

As these examples illustrate, on a number of occasions, the DOJ has encouraged the federal courts to follow the approach suggested years ago by Professor Hart. In his dialogue, Professor Hart argued that the judiciary “should use every possible resource of [statutory] construction to avoid the conclusion” that Congress stripped federal jurisdiction over constitutional claims.<sup>302</sup> The DOJ has not, of course, adopted this approach in every case. But, in recent years, the Solicitor General has consistently done so, even in the face of “categorical [statutory] language,”<sup>303</sup> strong evidence in the legislative history, and (as *Demore* illustrates) even when some members of the Supreme Court expressly invite a “jurisdiction-stripping” claim.

The federal judiciary has generally proven quite receptive to these arguments. Thus, with some executive encouragement, the courts appear to have adopted the super strong, clear-statement rule advocated by Professor Hart: “If Congress wants to frustrate the judicial check, our constitutional tradition requires that it be made to say so unmistakably . . . .”<sup>304</sup>

#### IV. THE SCOPE AND LIMITS OF ARTICLE II SAFEGUARDS

The executive branch has repeatedly sought to protect the Supreme Court’s appellate jurisdiction and federal jurisdiction over constitutional claims. Attorneys General of both parties have condemned jurisdiction-stripping bills in decisive terms, stating that “[m]atters of constitutional interpretation and adjudication are . . . pre-eminently within the province of the Federal judiciary,”<sup>305</sup> and that “[f]ull and unimpaired appellate jurisdiction in the Supreme Court is fundamental under our system of government.”<sup>306</sup> Furthermore, even when jurisdiction-stripping statutes have been enacted, the executive branch has urged the federal courts to

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mandatory detention). Justices Stevens, Souter, Ginsburg, and Breyer dissented from the Court’s holding on the merits. *Id.* at 540 (Souter, J., concurring in part and dissenting in part); *id.* at 576 (Breyer, J., concurring in part and dissenting in part).

301. *Id.* at 533 (O’Connor, J., concurring in part and concurring in the judgment) (asserting “a majority having determined there is jurisdiction, I agree with the Court’s resolution . . . on the merits,” but also asserting that the statute “unequivocally deprives federal courts of jurisdiction to set aside ‘any action or decision’ by the Attorney General in detaining criminal aliens under § 1226(c)” and noting “[t]hat is precisely the nature of the action before us”).

302. Hart, *supra* note 24, at 1399.

303. Brief for Respondent, *Calcano-Martinez*, *supra* note 272, at 23.

304. Hart, *supra* note 24, at 1399.

305. 125 Cong. Rec. 7637 (1979) (letter from Griffin B. Bell, Att’y Gen., to Sen. Abraham Ribicoff, Chairman, S. Comm. on Gov’t Operations).

306. Limitation of Appellate Jurisdiction Hearings 1958, *supra* note 139, at 573 (letter from William P. Rogers, Att’y Gen., to Sen. James O. Eastland, Chairman, S. Comm. on Judiciary).

construe such laws narrowly in order to preserve the Court's appellate review power and federal jurisdiction over constitutional claims.

These Article II safeguards are not, however, absolute. The executive branch's repeated efforts to protect the judiciary, along with the counterexamples, raise questions about the scope and limitations of the Article II safeguards of federal jurisdiction.

#### A. *The Possible Divergence of Presidential and DOJ Incentives*

The discussion of these Article II safeguards has, for the most part, treated the executive branch as a single entity. But, of course, there may be important ways in which the institutional incentives of a particular President and his Justice Department differ. Given that the DOJ's primary function is to litigate cases in federal court, it may be even more inclined than the President to protect the scope of federal jurisdiction. These agency-specific incentives may help explain why the executive branch has been so consistent in defending the federal courts.

1. *The Existence of "Agency Slack."* — A number of scholars have examined the relationship between the Attorney General and the Solicitor General and the President, analyzing how much influence the President has—or should have—over his chief law enforcement officers.<sup>307</sup> The approach taken by scholars generally turns on whether they view the executive branch as a hierarchical "unitary executive."<sup>308</sup> This Article does not attempt to enter that debate. The Article assumes, for purposes of analy-

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307. For discussions of the Attorney General, compare Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 *Duke L.J.* 561, 633–38 (arguing history does not clearly show President must have direct control over Attorney General's actions), William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 *Yale L.J.* 2446, 2478–79 (2006) (suggesting "[a]n independent attorney general, in the form of the state divided executive"), and Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 *Stan. L. Rev.* 1931, 1977–78 (2008) (advocating "structural changes that would enhance [the Attorney General's] independence"), with Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* 8–9 (2008) (arguing for presidential control and claiming "all forty-three presidents have always resisted serious incursions on the principle of the unitary executive"), and Saikrishna Prakash, *The Chief Prosecutor*, 73 *Geo. Wash. L. Rev.* 521, 546 (2005) (asserting historical evidence suggests Attorney General is "executive officer[ ] under presidential control"). For discussions of the Solicitor General, compare Caplan, *supra* note 171, at 7, 114 (arguing for independence from President, using Solicitor General Rex Lee as example), and Testimony of Professor Burt Neuborne *New York University Law School Before the Subcommittee on Oversight of the House Judiciary Committee Mar. 19, 1987*, 21 *Loy. L.A. L. Rev.* 1099, 1100 (1988) (asserting Solicitor General "should . . . minimize[ ] . . . the influence of politics"), with Salokar, *supra* note 170, at 34 (contending Solicitor General is "no more independent than . . . any other political appointee"), and John O. McGinnis, *Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory*, 44 *Stan. L. Rev.* 799, 804–05 (1992) (noting Solicitor General is obligated to "advance the President's interpretation of the Constitution and the laws made under it").

308. See sources cited *supra* note 307.

sis, that the President has the power to order his Attorney General to testify in favor of jurisdiction-stripping bills in Congress. Likewise, the Article assumes that the President could direct his Solicitor General to advocate a broader construction of jurisdiction-stripping laws.<sup>309</sup> As Matthew Stephenson has observed, even scholars who argue for strong political control of the bureaucracy (either by Congress or the President) acknowledge that agencies are, as a practical matter, somewhat insulated from their political superiors.<sup>310</sup> Political actors lack the resources, expertise, and sometimes the political will to direct all the actions of their administrative subordinates.<sup>311</sup> Furthermore, as scholars have emphasized in the context of the Solicitor General, it may be in the best interest of the President (and the executive branch more broadly) to give the chief Supreme Court advocate some room to maneuver, absent political oversight. If the Supreme Court views the Solicitor General as an independent and impartial advocate, the government may be far more likely to win its cases before the Court.<sup>312</sup>

Thus, even under the assumption that the President *could* direct the actions of the Attorney General and the Solicitor General, there is good reason to believe that he will not always do so. These executive officials will thus often have some leeway in expressing their views on matters pertaining to federal jurisdiction. These officials can use this “agency slack” to offer more emphatic defenses of the judiciary than the President himself might be inclined to do.

2. *Agency Slack in the Legislative Process.* — Although the willingness of the Roosevelt and Reagan Administrations to defend the scope of federal jurisdiction may at first glance seem the most surprising, those examples on reflection may in fact make the most sense. Both President Roosevelt and President Reagan were “reconstructive” leaders who sought to change the constitutional and political landscape.<sup>313</sup> These leaders recognized that, in order to have a long-term impact on the development of federal law, they needed to remake the federal judiciary, and particularly

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309. This Article thus does not take a position on debates over the “unitary executive.” For discussions of these debates, see, for example, Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 *Harv. L. Rev.* 1153, 1155 (1992) (considering unitary executive debate in relation to Article III jurisdiction-stripping debate); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *Colum. L. Rev.* 1, 2 (1994) (arguing unitary executive to be a recent construction and not Framers’ original intent).

310. See Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 *Mich. L. Rev.* 53, 57–58 (2008) (“[I]t is too costly to eliminate bureaucratic insulation completely.”).

311. See *id.* (“The fact that elected officials have limited time and expertise, for example, may make some de facto bureaucratic autonomy inevitable.”).

312. See, e.g., Eric Schnapper, *Becket at the Bar—The Conflicting Obligations of the Solicitor General*, 21 *Loy. L.A. L. Rev.* 1187, 1269 (1988) (arguing Solicitor General’s lack of independence would impair effectiveness as appellate litigator).

313. See *supra* Part II.A, D (discussing Roosevelt and Reagan Administrations’ approaches, respectively).

the Supreme Court. Accordingly, they sought to appoint judges who were likely to implement their constitutional vision in future federal court decisions. These Presidents thus also had an incentive to preserve federal jurisdiction over constitutional claims, so that this more “friendly” judiciary could “fix” what the leaders saw as the constitutional errors of the past. Both leaders had particularly good reason to protect the Supreme Court’s appellate jurisdiction, because its “decisions would establish the legal and ideological framework within which [the lower courts] . . . [would] operat[e].”<sup>314</sup> In sum, Presidents who seek to “reconstruct” the constitutional order have a strong incentive to preserve the scope of federal jurisdiction.

Accordingly, there is good reason to believe that Roosevelt’s Attorney General Homer Cummings and Reagan’s Attorneys General William French Smith and Ed Meese were acting in accordance with their leaders’ wishes when they opposed efforts to strip jurisdiction. Moreover, that assumption is consistent with the way in which these Attorneys General usually interacted with their Presidents. Social scientists have described Cummings, Smith, and Meese as “Advocate” Attorneys General who were personally close to the President and who saw it as their job to fulfill the political and legal aspirations of that elected leader.<sup>315</sup> These Attorneys General were thus unlikely to take positions on jurisdictional issues that were contrary to the President’s views.<sup>316</sup>

Presidents Eisenhower and Carter, by contrast, did not seek to “reconstruct” the constitutional order. These Presidents, of course (like all leaders), had an opportunity to shape the judiciary through their appointments. But there is little evidence that these leaders had a particular vision that they sought to advance through the federal courts.<sup>317</sup> In fact, both Presidents largely deferred legal matters to their Attorneys General.<sup>318</sup> Both Eisenhower’s Attorney General William Rogers and

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314. Gillman, *Agendas*, supra note 85, at 518.

315. See, e.g., Baker, supra note 171, at 35, 77, 95, 170 (arguing such “Advocate” Attorneys General “tend to be more responsive to the desires of the electorate or the president than to the niceties of the rule of law”). Indeed, Meese has been called Reagan’s ideological “alter ego.” *Id.* at 97.

316. Indeed, President Roosevelt was personally involved in the discussions leading up to the Court-packing plan. See Shesol, supra note 92, at 203–04, 259–62 (detailing Roosevelt’s involvement). So if Roosevelt had viewed jurisdiction stripping as a better alternative, he likely would have said so.

317. President Carter’s nominations did, however, reflect an apparent attempt to diversify the judiciary by appointing more women and minorities. See Joan Biskupic, *Obama’s Push for Court Diversity Hits Snag*, USA Today (June 15, 2010), [http://www.usatoday.com/news/washington/judicial/2010-06-15-diversity-lower-courts\\_N.htm](http://www.usatoday.com/news/washington/judicial/2010-06-15-diversity-lower-courts_N.htm) (on file with the *Columbia Law Review*) (describing Carter’s presidency as “breakthrough for non-traditional appointees”).

318. See Baker, supra note 171, at 155–56 (noting President Carter encouraged Attorney General Griffin Bell to maintain independence of his office); Whittington, *Foundations*, supra note 50, at 147, 219 (describing how Eisenhower entrusted legal matters, including Supreme Court appointments, to his Attorneys General). This does not

Carter's Attorney General Griffin Bell used this "agency slack" to defend the scope of federal jurisdiction.<sup>319</sup> Thus, although Presidents Eisenhower and Carter refused to either endorse or criticize federal court decisions, their Attorneys General argued emphatically that "[m]atters of constitutional interpretation and adjudication are . . . pre-eminently within the province of the Federal judiciary,"<sup>320</sup> and that "[f]ull and unimpaired appellate jurisdiction in the Supreme Court is fundamental under our system of government."<sup>321</sup>

The consistency of the Attorney General's approach to jurisdiction-stripping proposals may also reflect the importance of precedent within the Department of Justice. As Trevor Morrison has recently recounted, the Attorney General has traditionally treated the legal opinions of his predecessors as "precedents" that must be accorded considerable weight in the future.<sup>322</sup> That has been equally true of the DOJ's approach to jurisdictional restrictions. Indeed, Attorney General Smith expressly invoked precedent in support of his view that any limitation on the Supreme Court's appellate jurisdiction over constitutional claims would be both unwise and unconstitutional.<sup>323</sup>

Moreover, Attorney General Smith solidified this precedent by publishing his own strong defense of the federal judiciary as an official Office of Legal Counsel opinion. As Professor Morrison explains, the executive

mean that these Presidents gave their Attorneys General free rein. President Carter, for example, intervened in some cases litigated by the DOJ during his presidency and expressly overruled one of Bell's decisions. See Baker, *supra* note 171, at 156–60 (describing conflicts between Carter and Bell). But these Attorneys General were more independent of presidential control than their counterparts in the Reagan and Roosevelt administrations.

319. See *supra* Part II.B–C (discussing Eisenhower and Carter administrations' approaches, respectively). The Eisenhower Justice Department may have taken advantage of this "agency slack" to protect the Supreme Court's civil rights jurisprudence. Although the DOJ did not support the Court's "subversive activity" decisions, it did endorse the Court's racial equality rulings (more so than did the President himself). See Baker, *supra* note 171, at 68 (explaining Eisenhower's first Attorney General Herbert Brownell strongly supported civil rights); Pacle, *supra* note 69, at 74–75 (discussing approaches Eisenhower Attorneys General took towards civil rights). Thus, the Eisenhower Justice Department had an incentive—separate and apart from the President's incentives—to defend the Supreme Court's appellate jurisdiction to ensure that the Court could continue to play a role in civil rights cases.

320. 125 Cong. Rec. 7637 (1979) (letter from Att'y Gen. Griffin Bell).

321. Limitation of Appellate Jurisdiction Hearings 1958, *supra* note 139, at 573 (letter from Att'y Gen. William Rogers).

322. Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 Colum. L. Rev. 1448, 1470–92 (2010) [hereinafter Morrison, *Stare Decisis*].

323. See 128 Cong. Rec. 9094 n.1 (1982) (letter from William French Smith, Att'y Gen., to Sen. Strom Thurmond, Chairman, S. Judiciary Comm.) (observing "[t]he Department of Justice, in previous Administrations, has consistently opposed proposals to restrict Supreme Court jurisdiction," and citing congressional testimony by DOJ officials as well as internal DOJ memos dating from 1950s to 1980s).



branch does not often depart from such precedents.<sup>324</sup> The DOJ seems particularly unlikely to depart from an approach to jurisdiction stripping that has been repeatedly accepted by both Democratic and Republican administrations. Thus, the Justice Department's institutional interest in protecting its power and influence over the development of federal law, combined with its institutional respect for *stare decisis*, gives the Attorney General strong reasons to continue to oppose jurisdiction-stripping proposals in Congress.<sup>325</sup>

3. *Agency Slack in the Litigation Process.* — The Solicitor General also has independent institutional reasons to advocate a narrow construction of jurisdiction-stripping laws. The Solicitor General serves as the executive branch's conduit to the Supreme Court. Thus, "[o]nce cases reach the Supreme Court, the Solicitor General plays an important role in the development of American law" and can have a substantial "impact upon the establishment of constitutional and other [legal] principles."<sup>326</sup>

This advocacy position seems likely to have two important effects on the Solicitor General's approach to jurisdiction-stripping legislation. First, the Solicitor General should be especially wary of any effort to restrict the Supreme Court's appellate review power, such as the provision at issue in *Felker v. Turpin*;<sup>327</sup> any such restriction undermines the Solicitor General's own influence over the development of federal law. Second, the Solicitor General is likely to take cues from Supreme Court precedent in determining how to construe any jurisdictional provision. As the quintessential "repeat player" before the Court,<sup>328</sup> the Solicitor General has a strong interest in maintaining a good reputation with the Justices. Accordingly, the Solicitor General may be especially inclined to advocate a narrow construction of jurisdiction-stripping legislation if such a construction will be a winning argument before the Court (or if a contrary argument would harm the Solicitor General's reputation with the Court).

This "repeat player" dynamic helps explain why the Justice Department has been increasingly resistant to jurisdiction-stripping laws.

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324. Morrison, *Stare Decisis*, supra note 322, at 1457–58 (asserting, based on empirical analysis of Office of Legal Counsel precedents from Carter through Obama Administrations, the "OLC does not often overrule itself").

325. The executive branch does not appear to have issued any public statements about recent efforts in 2004 and 2006 to strip federal jurisdiction over constitutional challenges to the Defense of Marriage Act and to the use of "under God" in the Pledge of Allegiance. See Grove, supra note 40, at 911–16 (describing legislative history of these unsuccessful proposals). The OLC has informed me that there are no public documents pertaining to this legislation. Nevertheless, given the executive branch's longstanding opposition to such jurisdiction-stripping measures, it seems unlikely that the DOJ endorsed these proposals.

326. Days, supra note 69, at 680.

327. See supra notes 210–211 and accompanying text (describing provision at issue in *Felker*).

328. See, e.g., Salokar, supra note 170, at 3 (describing Solicitor General as "the ideal 'Repeat Player'").

After the Supreme Court handed down *Webster v. Doe* and similar decisions, stating that it would construe statutes narrowly in order to preserve federal court review of constitutional claims, the Solicitor General had a strong incentive to adopt such a narrow construction of future federal laws.<sup>329</sup>

This observation, of course, raises the question whether the Solicitor General's arguments have driven the Supreme Court's narrow construction of jurisdiction-stripping laws, or vice versa. But these two possibilities may not be mutually exclusive. As the Vietnam War era examples illustrate, the Solicitor General was resistant to jurisdictional restrictions even before the Supreme Court adopted its clear-statement rule regarding constitutional claims.<sup>330</sup> Moreover, even when the Solicitor General did argue that a statute precluded jurisdiction over constitutional claims, he made that argument in very narrow terms. For example, in *Webster*, Solicitor General Fried emphasized that "the national security context" of that case "distinguish[ed] [it] from the far broader and much debated issue of legislative restriction of federal court jurisdiction,"<sup>331</sup> and further declared that "whether a particular preclusion of review is constitutional is itself a constitutional question, review of which may not be precluded."<sup>332</sup> It thus does not appear that the Solicitor General's approach was entirely caused by Supreme Court precedent.

But, once the Supreme Court issued its clear-statement rule, that precedent undoubtedly encouraged the Solicitor General to take a more definitive stance on jurisdictional restrictions. As Solicitor General Olson acknowledged in *Demore v. Kim*, it is often in a government client's best interest for the DOJ to argue that the court has no jurisdiction over the case.<sup>333</sup> The Solicitor General can more easily justify a jurisdictional argument that is adverse to his client's interests if that argument seems virtually "compelled" by Supreme Court precedent.

Accordingly, it appears that the Supreme Court's decisions, and the Solicitor General's corresponding arguments, have been mutually beneficial and complementary. The Court's jurisprudence makes it easier for the Solicitor General to advocate a narrow construction of jurisdiction-stripping laws; and the DOJ's arguments, in turn, provide the federal courts with reassurance that such a narrow construction will have the support of a coequal branch of the federal government.

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329. See *supra* notes 248–262 (discussing *Webster*).

330. See *supra* notes 231–244 and accompanying text (discussing Solicitor General's resistance to jurisdiction stripping with regard to draft).

331. Brief for Petitioner, *Webster*, *supra* note 252, at 33–34.

332. Reply Brief for Petitioner, *Webster*, *supra* note 259, at 15. The same was true of the Justice Department's arguments in *Johnson v. Robison*, 415 U.S. 361 (1974). See *supra* note 248.

333. See *supra* notes 283–301 and accompanying text (discussing *Demore v. Kim*).

B. *The Limits of Article II Safeguards: Executive Acquiescence in Jurisdiction Stripping*

The executive branch has repeatedly defended the federal judiciary, seeking to protect the Supreme Court's appellate jurisdiction and federal jurisdiction over constitutional claims. But these Article II safeguards have not been absolute. The counterexamples raise the question of when, and under what circumstances, the executive branch is less likely to oppose jurisdiction stripping. Although this Article does not attempt to solve that difficult analytical puzzle, it suggests two factors that seem to influence the executive branch's approach.<sup>334</sup>

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334. Although there is insufficient evidence for a definitive conclusion, the executive branch's support for the judiciary may also be a modern development. As Parts II and III suggest, much of the evidence of executive support for the judiciary dates from the beginning of the twentieth century to the present day. That may reflect in large part the fact that most challenges to the Supreme Court's appellate jurisdiction and to federal jurisdiction over constitutional claims have occurred during that modern era. But there were a few legislative challenges to the Supreme Court's appellate jurisdiction in the nineteenth century, and the executive branch's record is mixed. The executive branch took no position on an 1831 effort to strip the Court's appellate jurisdiction over state court appeals. See *supra* note 80. But the executive strongly opposed the most dramatic challenge to the Supreme Court's appellate jurisdiction. In 1868, Congress restricted the Supreme Court's jurisdiction over a class of habeas claims in order to prevent the Court from reviewing the constitutionality of the reconstruction laws. See *supra* note 96. President Andrew Johnson attempted (unsuccessfully) to block the measure by vetoing it, asserting that any attempt to prevent Supreme Court review of a constitutional claim was "not in harmony with the spirit and intention of the Constitution." Cong. Globe, 40th Cong., 2d Sess. 2094 (1868). The measure was enacted only over President Johnson's veto. See *supra* notes 80, 96 (discussing these events).

By contrast, the executive branch supported another provision that interfered with (albeit without stripping) the Court's appellate review power. In the late 1860s, John Klein, the administrator of the estate of a Mississippi cotton farmer whose property was taken by the federal government (and who later received a presidential pardon), sought to recover the proceeds of the deceased's property. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 136 (1871). The Court of Claims ruled in favor of Klein, and the government appealed to the Supreme Court. *Id.* at 143. In 1870, while the case was on appeal, Congress enacted (with the support of President Ulysses S. Grant) a law directing the Court to dismiss such claims "for want of jurisdiction." Act of July 12, 1870, ch. 25, 16 Stat. 230, 235 (1870) ("[I]n all cases where judgment shall have been heretofore rendered in the court of claims in favor of any claimant [based on a pardon] . . . , the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction."). The Attorney General urged the Supreme Court to apply the statute and to dismiss Klein's suit. See Brief for Appellants at 3, *Klein*, 80 U.S. (13 Wall.) 128 (No. 156). The Court instead invalidated the statute. See *Klein*, 80 U.S. (13 Wall.) at 147–48. Although scholars have debated the precise ground of the Court's decision, see Howard M. Wasserman, *Constitutional Pathology, the War on Terror, and United States v. Klein*, 5 J. Nat'l Security L. & Pol'y 211, 211 (2011) (collecting sources describing *Klein* as "opaque" and "deeply puzzling"), it appears that the Court struck down the statute both as an unconstitutional infringement on the President's pardon power and as an infringement on the judicial power to choose the rule of decision for a particular case. See *Klein*, 80 U.S. (13 Wall.) at 147–48.

Notably, as the Supreme Court observed, the statute at issue in *Klein* was not a jurisdiction-stripping law akin to those discussed in this Article. See *id.* at 146. The statute

In prior work, I have argued that jurisdiction-stripping measures are more likely to be enacted when there is a major historical event that creates overwhelming political support for limitations on federal jurisdiction.<sup>335</sup> This factor seems to partly explain the President's support for measures that appeared (on their face) to eliminate the Supreme Court's appellate jurisdiction or federal jurisdiction over constitutional claims. For example, although members of Congress had sought for years to enact habeas reform, they did not assemble sufficient political support for AEDPA and IIRIRA—nor did they have the strong backing of President Clinton—until after the Oklahoma City bombing in 1995.<sup>336</sup>

But another factor (aside from such historical “triggering events”) also seems to influence the President's recent willingness to sign

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granted the Court jurisdiction to hear claims raised by former confederates. But when (as in *Klein*) the Court of Claims had ruled in favor of the former confederate, the statute directed the Supreme Court to overrule that decision and rule for the government—by dismissing the claim for “want of jurisdiction.” See *id.* (“The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.”). Nevertheless, the executive branch's acquiescence in this provision is in some tension with the analysis here. Given the paucity (and conflicting nature) of the evidence from the nineteenth century, it is not clear whether the executive branch was a protection for the judiciary during this early era.

335. Grove, *supra* note 40, at 916–20. This factor helps explain the enactment of several jurisdiction-stripping laws, including those that do not interfere with the executive branch's interest in preserving Supreme Court review and federal jurisdiction over constitutional claims. For example, jurisdictional restrictions were enacted in the wake of the stock market crash of 1929 and the ensuing Great Depression, see Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101–115 (2006)) (restricting lower federal courts' authority to issue injunctions in labor disputes); H.R. Rep. No. 72-669, at 11–16 (1932) (making clear that Norris-LaGuardia Act applied only to “the inferior Federal courts”); during World War II, see Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23 (allowing only Supreme Court, and not any lower federal or state court, to review certain administrative orders), amended by Act of July 25, 1946, ch. 671, 60 Stat. 664, 664; *Yakus v. United States*, 321 U.S. 414, 429–30, 443 (1944) (upholding Emergency Price Control Act); and in the wake of the September 11 attacks and the ensuing war on terror, see Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2742 (codified as amended at 28 U.S.C. § 2241(e) (2006)) (restricting federal habeas jurisdiction over claims of aliens detained at Guantanamo Bay); Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635–36 (amending 28 U.S.C. § 2241(e)) (restricting federal habeas jurisdiction over claims of noncitizens designated as “enemy combatants”); see also *infra* notes 342–345 and accompanying text (discussing war-on-terror legislation).

336. See Remarks on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 1 Pub. Papers 630, 630–31 (Apr. 24, 1996) (stating Clinton supported “additional” antiterrorism legislation after Oklahoma City bombing); Carrie M. Bowden, Note, The Need for Comity: A Proposal for Federal Court Review of Suppression Issues in the Dual Sovereignty Context After the Antiterrorism and Effective Death Penalty Act of 1996, 60 Wash. & Lee L. Rev. 185, 215 (2003) (“Although Congress considered habeas corpus reform for many years prior to the enactment of AEDPA, Congress wanted to take a hard line on crime after the Oklahoma City terrorism bombing.”).

jurisdiction-stripping legislation.<sup>337</sup> As discussed in Part II, the executive branch has repeatedly opposed jurisdiction-stripping proposals that were considered as stand-alone measures. More recent jurisdiction-stripping provisions, by contrast, have been part of omnibus legislation.

As social scientists have observed, Presidents are less likely to veto any measure—even one that they strongly oppose on either constitutional or policy grounds—when it is part of an omnibus bill, the bulk of which the President strongly supports.<sup>338</sup> Presidents instead often respond to such omnibus legislation by issuing signing statements, declaring that they will interpret and enforce the problematic provision in a manner that accords with the Constitution.<sup>339</sup> This same dynamic may help explain the President’s willingness to sign recent jurisdiction-stripping legislation. AEDPA and IIRIRA were complex statutes that contained many provisions other than the jurisdiction-stripping provisions discussed here.<sup>340</sup> Likewise, the provision in *Demore v. Kim* was part of the Immigration and Nationality Act, an enormous piece of legislation that governs numerous aspects of immigration and naturalization.<sup>341</sup> Just as Presidents have been inclined in recent years to sign large omnibus legislation, and yet “oppose” certain provisions via signing statements, Presidents may be willing to sign such legislation, and yet permit the Department of Justice to “oppose” the jurisdiction-stripping provisions via litigation.

Thus, the executive branch seems most likely to consent to jurisdictional restrictions (1) following a major historical event, and (2) when the jurisdictional restriction is integrated into an expansive statute, the bulk of which the President supports. These factors may help explain the enactment of recent jurisdiction-stripping laws in response to the “war on terror.”<sup>342</sup> Notably, these statutes largely preserved the Supreme Court’s

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337. Indeed, the concept of “triggering events” seems an insufficient explanation for the President’s approach. After all, in the wake of one major historical event (the Civil War), President Andrew Johnson vetoed the 1868 legislation that sought to restrict the Supreme Court’s appellate jurisdiction over habeas cases. See *supra* note 81 (noting how reconstruction laws were enacted over President Andrew Johnson’s veto).

338. See, e.g., Glen S. Krutz, *Tactical Maneuvering on Omnibus Bills in Congress*, 45 *Am. J. Pol. Sci.* 210, 212 (2001) (asserting “Congressional leaders may include measures that the president opposes in omnibus bills in order to avert a veto” and that “the power of the presidential veto is [thereby] diluted”).

339. See Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 *Const. Comment.* 307, 341 (2006) (arguing “as a political matter [Presidents] will not be able to veto [omnibus legislation] simply because of constitutional concerns about a particular provision,” and that Presidents can better oppose such measures by issuing signing statements); Paul T. Stepnowsky, *Deference to Presidential Signing Statements in Administrative Law*, 78 *Geo. Wash. L. Rev.* 1086, 1090 (2010) (“[T]he size and complexity of omnibus legislation has incentivized the use of signing statements when the Executive seeks to challenge a narrow portion of a statute without using his veto authority.”).

340. See *supra* Part III (discussing jurisdictional restrictions in AEDPA and IIRIRA).

341. See *supra* notes 283–301 and accompanying text (discussing *Demore v. Kim*).

342. The Detainee Treatment Act of 2005 (DTA) and the Military Commissions Act of 2006 (MCA) were designed to eliminate federal habeas jurisdiction over the claims of

appellate jurisdiction and federal jurisdiction over constitutional claims<sup>343</sup> and thus did not interfere with the executive branch's principal concerns about federal jurisdiction. But one provision of the Military Commissions Act of 2006 (MCA) does purport to eliminate federal jurisdiction over a detainee's challenge to his "conditions of confinement" during his detention.<sup>344</sup> It does not appear that the second Bush Administration made any public statements about this provision during the legislative process.<sup>345</sup> But the executive branch's acceptance of this jurisdiction-stripping measure arguably accords with the analysis here. The MCA was enacted in the wake of a major historical event: the attacks of September 11, 2001 and the ensuing war on terror. Moreover, the MCA was an expansive statute, the bulk of which the President supported.

However, with respect to the MCA, there are reasons to doubt that the executive branch simply acquiesced in a jurisdictional restriction championed by members of Congress. Although the executive does not

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alleged enemy combatants in the war on terror. See DTA, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2742 (2005) (amending 28 U.S.C. § 2241(e) (2006)) (stating "no court, justice, or judge shall have jurisdiction to hear or consider . . . a writ of habeas corpus filed by or on behalf of an alien detained . . . at Guantanamo Bay"); MCA, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635-36 (2006) (amending 28 U.S.C. § 2241(e)(1)) (stating "[n]o court, justice, or judge shall have jurisdiction to hear or consider . . . a writ of habeas corpus filed by or on behalf of an alien . . . who has been determined . . . to have been properly detained as an enemy combatant"). Those claims were instead routed to a military tribunal (either a combatant status review tribunal or a military commission) followed by judicial review in the D.C. Circuit and the Supreme Court. See DTA, § 1005(e), 119 Stat. at 2742 (stating D.C. Circuit "shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant"); MCA, § 950(g), 120 Stat. at 2622 (stating D.C. Circuit "shall have exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission"). Although the DTA gives the D.C. Circuit "exclusive" jurisdiction to review decisions of combatant status review tribunals, such "exclusivity" provisions are generally construed so as to preserve Supreme Court review. See, e.g., *Administrative Orders Review Act*, 28 U.S.C. § 2342 (2006) (providing that "[t]he court of appeals . . . has exclusive jurisdiction" to review "final orders" from certain federal agencies); *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 750-51 (2002) (reviewing court of appeals decision in case brought under 28 U.S.C. § 2342).

343. See *supra* note 342 (explaining provisions preserved Supreme Court review). The provisions of the DTA and the MCA creating the alternative review processes also expressly preserved review of any applicable constitutional claims. See DTA § 1005(e)(2)(C), 119 Stat. at 2742 (permitting D.C. Circuit to review "to the extent the Constitution and laws of the United States are applicable, whether the use of [certain] standards and procedures [by combatant status review tribunals] is consistent with the Constitution and laws of the United States"); MCA § 950g, 120 Stat. at 2622 (permitting D.C. Circuit to consider whether, "to the extent applicable," "the final decision [of the military commission] was consistent with . . . the Constitution and the laws of the United States").

344. See 28 U.S.C. § 2241(e)(2) (foreclosing any challenge to a detainee's "conditions of confinement" in any court); *infra* Part IV.C.2 (discussing provision in greater detail).

345. President Bush did not issue a signing statement with this legislation. Nor have I been able to uncover any other public statements about this provision.

appear to have taken a position on the “conditions of confinement” measure, the second Bush Administration generally sought to avoid judicial oversight of its actions in the “war on terror.”<sup>346</sup> It therefore seems quite possible that the Administration supported the “conditions of confinement” measure.

As noted above, this Article does not purport to explain every instance in which the executive branch has supported efforts to restrict federal jurisdiction.<sup>347</sup> But these counterexamples do not undermine the central point of this Article: The executive branch has repeatedly served as an important (and largely unnoticed) protection for the federal judiciary in its jurisdictional struggles with Congress. Indeed, even the story of the executive’s approach to the MCA is not yet complete. Although the executive branch did not contest the “conditions of confinement” provision in the legislative process, the DOJ could oppose this restriction via litigation—a possibility I explore below.

Notably, Congress’s reliance on omnibus and similarly expansive legislation has largely coincided with the Solicitor General’s increased willingness to argue for narrow constructions of jurisdiction-stripping laws. Since the Supreme Court issued its clear-statement rule in *Webster* and related cases, the Solicitor General does not appear to have argued in any Supreme Court case that a federal statute eliminates federal court review of constitutional claims.<sup>348</sup> Nor has the Solicitor General argued that a

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346. Indeed, President George W. Bush initially chose to house noncitizen detainees at the naval base in Guantanamo Bay, Cuba, in large part to avoid federal judicial oversight. See Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* 108 (2007) (“[B]ecause [GTMO] was technically not a part of U.S. sovereign soil, it seemed like a good bet to minimize judicial scrutiny. . . . [T]he legal case . . . was not airtight. . . . [But it was] . . . ‘the least worst place’ available.” (quoting Secretary of Defense Donald Rumsfeld)).

347. Notably, the Article focuses on executive responses to *legislative* efforts to restrict federal jurisdiction, arguing that the executive branch has a strong incentive to protect the judiciary from such congressional encroachments. The Article does not address unilateral executive decisions to allocate certain wartime issues to military tribunals as opposed to the federal courts, such as President Roosevelt’s decision during World War II to try a group of Nazi saboteurs by military commission. See Francis Biddle, *In Brief Authority* 325–31 (1962) (discussing these events). Although the President issued an executive order purporting to prohibit federal court review of the military tribunal’s decision, see Proclamation No. 2561, 3 C.F.R. 309 (1943) (stating that such “enemies” “shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly . . . in the courts of the United States”), the Supreme Court held that the President’s order did not apply to a habeas petition challenging the jurisdiction of the military tribunal itself. See *Ex parte Quirin*, 317 U.S. 1, 25 (1942) (“[N]either the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners’ contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.”). The Court ultimately held that the saboteurs could be tried by military commission. See *Quirin*, 317 U.S. at 48.

348. There are examples of such arguments in the lower courts. For example, the government argued in lower court proceedings that the statute in *Demore v. Kim* cut off all federal jurisdiction. See Transcript of Oral Argument, *Demore*, *supra* note 291, at 4–5 (describing government’s position during lower court proceedings that statute in *Demore v.*

statute cuts off all avenues to the Supreme Court.<sup>349</sup> Accordingly, even as the Article II safeguards in the legislative process have weakened, the Article II safeguards in litigation seem to have grown more robust.

### C. *Implications*

Scholars have long overlooked the important role that the executive branch has played in the jurisdictional struggles between Congress and the judiciary. The primary goal of this Article is to correct that omission and to demonstrate that the executive branch has repeatedly used the structural tools of Article II to protect the Article III courts. But the analysis here may also have broader implications for constitutional scholarship and for future litigation in the war on terror.

1. *Theoretical Implications: Separation of Powers, Not Parties.* — Daryl Levinson and Richard Pildes have offered a powerful challenge to the traditional conception of separation of powers. Under traditional Madisonian theory, each branch of government has institutional incentives that lead it to “check” the other branches to ensure that they do not infringe on constitutional values.<sup>350</sup> Professors Levinson and Pildes argue that this scheme is unlikely to work during periods of unified govern-

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*Kim* cut off all federal jurisdiction). The Solicitor General reversed that position once the case reached the Supreme Court. See *id.* at 4 (“[I]t’s the Government’s position, as held by three courts of appeals, that that provision does not apply to a habeas corpus challenge to the constitutionality of the statute itself . . .”). Notably, the Solicitor General does not oversee all lower court litigation, not even at the appellate level. For that reason, the Solicitor General cannot ensure consistent DOJ arguments in every case.

349. The government’s approach in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), is consistent with this claim. The DOJ (through Solicitor General Paul Clement) asserted that the Detainee Treatment Act, as originally enacted, applied to pending habeas corpus cases and thus prevented the Supreme Court from reviewing the pending appeal in *Hamdan*. Respondents’ Motion to Dismiss for Lack of Jurisdiction at 9–15, *Hamdan*, 548 U.S. 557 (No. 05-184). But the government emphasized that the statute did not thereby “leave [*Hamdan*] without any avenue of judicial review.” *Id.* at 3. He could “seek review in the [D.C.] Circuit” and further “review in [the Supreme] Court.” *Id.* Under the DOJ’s view, therefore, the statute preserved Supreme Court review (and thus likewise preserved the Solicitor General’s influence over the development of federal law in terrorism cases). Ultimately, the *Hamdan* Court held that the DTA’s jurisdiction-stripping provision did not apply to pending cases. 548 U.S. at 581–84. The Military Commissions Act effectively overruled *Hamdan* by expressly extending the habeas restriction to pending cases. See MCA, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635–36 (2006) (amending 28 U.S.C. § 2241(e)(1)).

350. See *The Federalist* No. 51, at 285 (James Madison) (E.H. Scott ed., 1788) (setting forth “separate and distinct exercise of the different powers of government . . . to be essential to the preservation of liberty”).



ment.<sup>351</sup> Instead, when the President and Congress are controlled by the same political party, they are likely to cooperate rather than compete.<sup>352</sup>

This concept of “separation of parties, not powers” has gained increasing acceptance among scholars and has encouraged scholars to refine prior understandings of our constitutional system.<sup>353</sup> The analysis offered by Professors Levinson and Pildes does not, however, explain the way in which the branches operate in relation to the judiciary.

As the above historical survey demonstrates, the executive branch has opposed jurisdiction-stripping measures, even during periods of unified government, and even when the measures were sponsored by members of the President’s own party. For example, the Roosevelt Administration rejected proposals by legislators in the Democratic Party to eliminate the Supreme Court’s appellate jurisdiction over constitutional claims—even during a period of unified government, when the Democrats had overwhelming majorities in both chambers of Congress.<sup>354</sup> Likewise, the Reagan Administration strongly opposed the school prayer proposal championed by President Reagan’s fellow Republican Senator Jesse Helms.<sup>355</sup>

This dynamic can be largely explained by the different institutional incentives of Congress and the executive branch. The executive branch is in “close contact” with the judiciary—not only because the President plays a leading role in judicial appointments, but also because he can

351. Levinson & Pildes, *supra* note 11, at 2385 (“From nearly the start of the American republic, the separation of powers as the Framers understood it, and as contemporary constitutional law continues to understand it, had ceased to exist.”).

352. *Id.* at 2316 (arguing “[t]he greatest threat to constitutional law’s conventional understanding of, and normative goals for, separation of powers comes when government is unified”).

353. See, e.g., Bruce Ackerman, 2006 Oliver Wendell Holmes Lectures—The Living Constitution, 120 *Harv. L. Rev.* 1737, 1809 n.222 (2007) (agreeing with Professors Levinson and Pildes that “the branches operate very differently depending on whether they are all controlled by the same party”); Devins & Lewis, *supra* note 67, at 479 (“[T]he separation of powers between Congress and the White House has given way to the ‘separation of parties.’”); Goodwin Liu, The Bush Administration and Civil Rights: Lessons Learned, 4 *Duke J. Const. L. & Pub. Pol’y* 77, 87 (2009) (“In practice, however, competition between political parties often displaces competition between the political branches . . .”). Other scholars, however, have asserted that the “separation of parties” argument may be somewhat overstated. See Eric A. Posner & Adrian Vermeule, Constitutional Showdowns, 156 *U. Pa. L. Rev.* 991, 1036 (2008) (arguing “the American constitutional system . . . displays both separation of powers and parties in a complicated interaction”).

354. See John P. McIver, Party Affiliation and Public Opinion: Political Party Affiliations in Congress and the Presidency: 1789–2002, in 5 *Historical Statistics of the United States* 200, 201 (Susan B. Carter et al. eds., 2006) (showing Democrats controlled House 331-89 and Senate 76-16); *supra* Part II.A (describing Roosevelt Administration’s resistance to proposals to restrict jurisdiction over constitutional claims).

355. See *supra* note 155 and accompanying text (discussing Attorney General’s letter to Congress urging rejection of Senator Helms’s proposal); *supra* Part II.D (discussing Reagan Administration’s continuous opposition to jurisdiction stripping).

“[t]hrough control over the Justice Department . . . exercise significant influence over . . . what arguments are presented” to the courts.<sup>356</sup> These institutional powers enable the President to influence the development of federal law through the judiciary—an authority that many leaders have used to advance their constitutional philosophy.<sup>357</sup> The President’s institutional position thus gives him a strong incentive to defend the scope of federal jurisdiction.

Congress, by contrast, has few ways to directly affect the course of judicial decisions. Congress may, of course, seek to influence the courts by changing the size of the judiciary, declining to increase judicial pay, or even modifying the scope of federal jurisdiction.<sup>358</sup> But Congress rarely speaks directly to the courts in litigation and thus has far less influence over the development of federal law.<sup>359</sup> Indeed, that may be why an all-Democratic Congress balked at Roosevelt’s Court-packing proposal. Given the executive branch’s influence with the judiciary in normal times, legislators found “abhorrent” “[t]he idea of giving [the] president . . . the [additional] authority to remake the Supreme Court virtually overnight.”<sup>360</sup>

Thus, with respect to the judiciary, Congress and the President have competing institutional incentives that lead them to approach jurisdiction-stripping (and other court-curbing) proposals differently. As Madisonian theory might predict, the executive branch’s institutional incentives—its “ambition” to have greater influence over the development of federal law—lead it to “resist” congressional encroachments on federal jurisdiction during periods of both unified and divided government.<sup>361</sup> The analysis here thus offers an important correction to the view that the checks and balances scheme envisioned by Madison depends upon the “separation of parties.” The federal judiciary has historically been protected by the separation of powers, not parties.

2. *Practical Implications: The War on Terror.* — This history of executive branch support for the judiciary may have implications not only for constitutional scholarship but also for future litigation in the war on terror. A provision of the Military Commissions Act of 2006, in terms reminiscent of AEDPA and IIRIRA, purports to cut off all federal jurisdiction over certain claims:

356. Whittington, Foundations, *supra* note 50, at 196.

357. See *supra* notes 50–57 and accompanying text (highlighting presidential efforts to influence judiciary to further presidential aims).

358. Akhil Reed Amar, *America’s Constitution: A Biography* 212–14 (2005) (“In fact, Congress had many weapons to wield or at least brandish against the justices, if it so chose.”).

359. For an insightful analysis of why Congress acquiesces in presidential control of litigation, see Neal Devins & Michael Herz, *The Battle That Never Was: Congress, the White House, and Agency Litigation Authority*, *Law & Contemp. Probs.*, Winter 1998, at 205, 206.

360. Shesol, *supra* note 92, at 316.

361. *The Federalist* No. 51 (James Madison).

[N]o court, justice, or judge shall have jurisdiction to hear or consider any . . . action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.<sup>362</sup>

This provision seems to foreclose any challenge to a detainee’s “conditions of confinement” in any court. The legislative history supports that construction. For example, Senator Lindsay Graham, one of the sponsors of the jurisdiction-stripping provision, declared that it would “take . . . conditions of confinement lawsuits off the table.”<sup>363</sup> Likewise, Senator Jesse Bingaman asserted that the legislation “eliminates the ability of aliens . . . to bring . . . claims related to their detention or their treatment or their conditions of confinement.”<sup>364</sup>

The Supreme Court has not ruled on the validity of this provision.<sup>365</sup> But several scholars have declared that the “conditions of confinement” provision is unconstitutional insofar as it precludes federal jurisdiction over constitutional claims. Thus, Professor Alexander has urged that “the complete denial of judicial review of constitutional claims is beyond Congress’s power under the Exceptions . . . Clause,” because it deprives the Supreme Court of its “essential role.”<sup>366</sup> Professors Fallon and Meltzer have likewise criticized this “total preclusion of judicial review,” stating that “[i]n the end, the individual’s substantive constitutional claim . . . may not prevail, but the foreclosure of jurisdiction cannot, by itself, bar all courts” from even considering the issue.<sup>367</sup>

This provision of the MCA, like AEDPA and IIRIRA, seems to raise much-mooted questions about the outer boundaries of Congress’s power over federal jurisdiction. But once again, the federal courts may be able to avoid those troubling questions. The executive branch could urge the courts to construe this provision narrowly in order to preserve federal jurisdiction over federal constitutional claims.

The DOJ has thus far had few occasions to address the scope of the MCA’s “conditions of confinement” provision. But the approach of the Bush Justice Department in *Rasul v. Myers* may be instructive.<sup>368</sup> *Rasul*

362. 28 U.S.C. § 2241(e)(2) (2006).

363. 152 Cong. Rec. 19,973 (2006) (statement of Sen. Lindsay Graham).

364. *Id.* at 19,967 (statement of Sen. Jesse Bingaman).

365. In *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), the Court struck down the MCA’s habeas restrictions on Suspension Clause grounds, concluding that the alternative review process (in a military tribunal followed by federal court review) did not provide an adequate substitute for habeas corpus. *Id.* at 2274. The Court then declined to “discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement.” *Id.*

366. Alexander, *supra* note 38, at 1208, 1239.

367. Fallon & Meltzer, *supra* note 37, at 2063.

368. 512 F.3d 644 (D.C. Cir. 2008), vacated, 129 S. Ct. 763 (2008), remanded to 563 F.3d 527 (D.C. Cir. 2009).

involved a group of British citizens who were captured in Afghanistan and then detained at Guantanamo Bay from 2002 until 2004 (when they were released and returned to the United Kingdom).<sup>369</sup> The plaintiffs claimed that they were “systematically and repeatedly tortured throughout their two-year detention at Guantanamo” and that high-level government officials knew about this “torture and mistreatment.”<sup>370</sup> They brought a *Bivens* claim, asserting that the interrogation tactics used against them “constituted cruel and unusual punishment in violation of the Eighth Amendment” and that “the cruel, inhuman or degrading conditions at Guantanamo” violated the Due Process Clause of the Fifth Amendment.<sup>371</sup>

The suit in *Rasul* would seem on its face to be an “action against the United States or its agents relating to . . . [the] conditions of confinement” of alleged enemy combatants, thus triggering the jurisdictional bar in the MCA.<sup>372</sup> The case therefore should have raised serious questions about the scope of Congress’s power over federal jurisdiction.

But the Justice Department never raised the jurisdictional issue. Instead, the DOJ urged the court to dismiss the constitutional and other claims on the merits, arguing in part that the government officials were entitled to qualified immunity.<sup>373</sup> Nor did the courts question their jurisdiction over the action, but instead simply ruled in the government’s

369. See *Rasul*, 512 F.3d at 649–50.

370. *Id.* at 650.

371. *Id.* at 663 (internal quotation marks omitted); see *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (creating private right of action to seek monetary damages for constitutional violations by state actors).

372. 28 U.S.C. § 2241(e)(2) (2006). Notably, it does not appear that the plaintiffs in *Rasul* ever had their status determined by a combatant status review tribunal (CSRT), because the government did not begin using such tribunals until after their departure in 2004. Thus, there might be a question whether they were “properly determined” to be enemy combatants for the purposes of § 2241. But the MCA does not define an “enemy combatant” solely based on a CSRT determination. See Military Commissions Act of 2006, Pub. L. 109-366, § 3(a), 120 Stat. 2600, 2601 (codified at 10 U.S.C. § 948a) (defining enemy combatant as person who “has engaged in hostilities . . . against the United States” or who “has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense”). Likewise, the legislative history indicates that at least some members of Congress sought to bar review whether or not a CSRT was held. See 152 Cong. Rec. 20,319 (2006) (statement of Sen. John Cornyn) (“This new language . . . eliminates the requirement that the D.C. Circuit review a CSRT, or that a CSRT even be held, before nonhabeas actions are barred. . . . [M]any detainees were released before CSRTs were . . . instituted. We do not want those who were properly detained . . . to be able to sue the U.S. military.”); *id.* at 20,320 (statement of Sen. Jeff Sessions) (“The new bill . . . bars all litigation by anyone found to have been properly detained as an enemy combatant, regardless of whether the detainee . . . has been through a [CSRT] hearing.”).

373. See Brief for the Respondents in Opposition at 10, *Rasul v. Myers*, 130 S. Ct. 1013 (2009) (No. 09-227) [hereinafter Brief for Respondents, *Rasul*] (making qualified immunity argument); Brief for Appellees/Cross-Appellants at 12, *Rasul*, 512 F.3d 644 (Nos. 06-5209, 06-5222) (same).

favor on the merits.<sup>374</sup> Thus, although the plaintiffs' constitutional claims "[i]n the end . . . [did] not prevail,"<sup>375</sup> the federal courts were not prevented from considering the issue.

It is not yet clear what approach the current Justice Department will take with respect to the "conditions of confinement" provision.<sup>376</sup> But as it contemplates its approach, the executive could consider how prior administrations have dealt with similar statutes.

The DOJ could draw upon the practice of the Clinton and Bush Administrations in the litigation over AEDPA and IIRIRA. There, in the face of equally broad jurisdiction-stripping language, the DOJ urged the federal courts to construe the statutes narrowly in order to preserve jurisdiction over constitutional claims.<sup>377</sup> Likewise, the Obama Justice Department could argue: "Notwithstanding [the MCA]'s categorical language, neither the text nor the legislative history . . . adverts *specifically* to

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374. The D.C. Circuit initially held that the Guantanamo detainees lacked constitutional rights. See *Rasul*, 512 F.3d at 663–65. The Supreme Court later remanded the case for reconsideration in light of its decision in *Boumediene*, see *Rasul v. Myers*, 129 S. Ct. 763, 763 (2008), and the court of appeals ultimately rejected the plaintiffs' constitutional claims on qualified immunity grounds, see *Rasul v. Myers*, 563 F.3d 527, 532 (D.C. Cir. 2009). The Supreme Court subsequently denied certiorari. *Rasul*, 130 S. Ct. 1013.

375. Fallon & Meltzer, *supra* note 37, at 2063.

376. The Obama Administration maintained the same position as the Bush Justice Department in *Rasul*, declining to question jurisdiction and seeking a favorable decision on the merits. See Brief for Respondents, *Rasul*, *supra* note 373, at I (citing only questions of qualified immunity). But, in a recent "conditions of confinement" case in the lower courts, which also involved *Bivens* claims, the Obama Justice Department did raise the jurisdictional bar. See Memorandum of Points and Authorities in Support of the Individual Defendants' Motion to Dismiss Plaintiffs' Constitutional Claims at 4, *Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103 (D.D.C. 2010) (No. 1:09-CV-00028 (ESH)), 2009 WL 2249118, at \*6 (quoting *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 312, 314 (D.D.C. 2008)) (arguing statute strips court of conditions of confinement jurisdiction). Yet, in district court, after the plaintiffs challenged the constitutionality of the jurisdictional bar, see Plaintiffs' Memorandum in Opposition to Individual Defendants' and United States' Motions to Dismiss and United States' Motion to Substitute at 10–22, *Al-Zahrani*, 684 F. Supp. 2d 103 (No. 1:09-CV-00028 (ESH)), 2009 WL 4920681, at \*8–\*18, the DOJ made little effort to defend the statute and instead invited the district court to rule on the *Bivens* claims on the merits. See Reply Memorandum in Support of the Individual Defendants' Motion to Dismiss Plaintiffs' Constitutional Claims at 4–6 & n.3, *Al-Zahrani*, 684 F. Supp. 2d 103 (No. 1:09-cv-00028 (ESH)), 2009 WL 5899645, at \*4–\*7 & n.3 ("[T]he court may resolve Plaintiffs' claims on special factors and qualified immunity grounds alone."). The district court accepted that invitation. See *Al-Zahrani*, 684 F. Supp. 2d at 110–12 (declining to decide jurisdictional issue and dismissing *Bivens* claims on merits). The government seems to have taken a similar approach on appeal. See Brief for Defendants-Appellees at 52, *Al-Zahrani v. Rodriguez*, No. 10-5393 (D.C. Cir. filed July 13, 2011), 2011 WL 2729234, at \*52 (arguing court of appeals could "affirm without reaching [plaintiffs'] constitutional challenge" to § 2241(e)(2)). Notably, the Solicitor General does not supervise all lower court litigation. Accordingly, the Solicitor General will not necessarily adopt the same approach in later stages of this case or future cases.

377. See *supra* notes 270–280 and accompanying text (detailing DOJ arguments regarding AEDPA and IIRIRA legislation).

preclusion of review of constitutional claims . . . .”<sup>378</sup> Accordingly, the federal courts “retain authority to consider such claims.”<sup>379</sup>

Such an approach would help ensure that many of the questions about Congress’s power over federal jurisdiction would go unresolved. And there is much to be said for this “avoidance” approach. As Barry Friedman has asserted, there may be reasons to leave the lines of congressional authority over federal jurisdiction in doubt. “Uncertainty breeds caution,” deterring Congress from advancing policies through jurisdictional restrictions, without removing the possibility that Congress could rely on that authority at some point.<sup>380</sup> The executive branch could encourage the courts to leave the issue unresolved by again insisting that “[i]f Congress wants to frustrate the judicial check,” it must “say so unmistakably.”<sup>381</sup>

#### CONCLUSION

Jurisdiction stripping has long been treated as a battle between Congress and the federal courts. Scholars have thus overlooked the important (and surprising) role that the executive branch has played in these jurisdictional struggles. The President and the Department of Justice have strong institutional incentives to defend the scope of federal jurisdiction. Because of their “close contact” with the federal judiciary,<sup>382</sup> these executive officials can use litigation to have a substantial impact upon “the development of American law” and “the establishment of constitutional . . . principles.”<sup>383</sup>

For this reason, the executive branch has repeatedly opposed jurisdiction-stripping legislation in Congress (even when the President otherwise strongly disagreed with the federal courts’ jurisprudence). Likewise, the Justice Department has repeatedly urged the courts to construe jurisdiction-stripping laws narrowly. The executive branch has thus proven to be an important ally for the federal courts, using the structural tools of Article II to ensure that Congress complies not only with the letter but also with “the structure and spirit of the [Constitution].”<sup>384</sup>

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378. Brief for Respondent, *Calcano-Martinez*, supra note 272, at 23 (emphasis added).

379. *Id.*

380. Barry Friedman, A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction, 85 *Nw. U. L. Rev.* 1, 58 (1990).

381. Hart, supra note 24, at 1399.

382. Whittington, *Foundations*, supra note 50, at 196.

383. Days, supra note 69, at 680.

384. Bator, supra note 4, at 1039.